S. HRG. 101-631

NOMINATIONS OF HART T. MANKIN AND RONALD M. HOLDAWAY

HEARING

BEFORE THE

COMMITTEE ON VETERANS' AFFAIRS
UNITED STATES SENATE

ONE HUNDRED FIRST CONGRESS

SECOND SESSION

ON

THE NOMINATIONS OF HART T. MANKIN AND RONALD M. HOLDAWAY TO BE ASSOCIATE JUDGES OF THE UNITED STATES COURT OF VETERANS APPEALS

FEBRUARY 8, 1990

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NOMINATIONS OF HART T. MANKIN AND RONALD M. HOLDAWAY TO BE ASSOCIATE JUDGES OF THE U.S. COURT OF VETERANS APPEALS

THURSDAY, FEBRUARY 8, 1990

U.S. SENATE,
COMMITTEE ON VETERANS' AFFAIRS,
Washington, DC.

The committee met, pursuant to notice, at 9:40 a.m., in room SR-418, Russell Senate Office Building, Hon. Alan Cranston (chairman of the committee) presiding.

Present: Senators Cranston and Murkowski.

Also present: Senators Roth and Biden.

Chairman CRANSTON. This hearing will come to order.

Good morning. I am pleased to welcome all of you to this hearing of the committee to consider the nominations of Hart T. Mankin and Ronald M. Holdaway to be Associate Judges of the U.S. Court of Veterans Appeals.

Hart and Ron, a warm welcome to each of you. I offer you both my sincere congratulations on your nominations for this very high office.

I am pleased to note you both have family members here today. Hart Mankin I understand is accompanied by his wife Ruth and his daughter Margaret. Hart, I also understand you have a son in California, a good place for him to be. [Laughter.]

I admire his choice of States.

Ron Holdaway's wife Judith is also with us. A special warm welcome to each and all of you. I know how proud you are of our two nominees.

I have more to say about what we are doing, but I am going to yield now to the two Senators who are here to formally introduce you to us. So, I will yield to you, Senator Biden.

Senator BIDEN. I would yield to Senator Roth if that is all right with you, Mr. Chairman.

Chairman CRANSTON. Sure. Bill.

STATEMENT OF HON. WILLIAM V. ROTH, JR., A U.S. SENATOR FROM THE STATE OF DELAWARE

Senator ROTH. Well, thank you, Mr. Chairman.

It is a great pleasure and an honor to introduce Hart Mankin and his family. I have known them for the many years that they have lived in my State of Delaware.

He comes here as a well-qualified man of great integrity. Hart Mankin, Mr. Chairman, has served in our Air Force where he rose to the rank of captain. He has served in many distinguished positions in Government: general counsel of the U.S. General Services Administration, general counsel of the U.S. Navy. He for many years acted as general counsel of Columbia Gas Corp., which is headquartered in my home city of Wilmington.

But I think the most important thing is that he is a man of great integrity. He is the kind of man that I think will serve with distinction, honor, and I am proud to rate him as a personal friend.

[The prepared statement of Senator Roth appears on p. 17.]

Chairman Cranston. Thank you very much, Bill.

Joe.

STATEMENT OF HON. JOSEPH R. BIDEN, JR., A U.S. SENATOR FROM THE STATE OF DELAWARE

Senator Biden. Thank you very much, Mr. Chairman.

Mr. Chairman, I want to thank you and the committee for giving me the opportunity to be here today. And quite frankly, I would like to thank Hart and Ruth Mankin for giving me the privilege of being able to introduce them along with my colleague, Senator Roth.

One thing that will not appear in the resume, Mr. Chairman, is that you will soon be speaking to, and you are now looking at, two of the most powerful Republicans in my State. We have agreed on some things and not on others. But one thing about Hart Mankin that everyone agrees on—quite frankly, the same could apply to his wife Ruth were she a nominee as well—is his commitment and dedication to the community.

I would like to ask unanimous consent that a longer statement setting out Hart's record, background, education, and present position be placed in the record so I do not take the committee's time.

Chairman Cranston. That will go in the record.

Senator Biden. I would like to focus on the reason why I believe Hart Mankin will be particularly qualified for this job. Quite frankly, he is an extremely respected attorney. He would be qualified to be sitting before my committee for a judgeship in other capacities—in article 3 courts—if that were to be the choice.

But as you know better than any of us here, we took the establishment of this position for which he has been nominated quite seriously. We thought it was necessary for military women and men to have an opportunity to have their grievances heard and their cases heard in a forum that was viewed to be totally impartial. We thought it required, quite frankly, in my view, Mr. Chairman, people to sit on that court who had not only a background in and knowledge of the military (which is to the best of my knowledge not statutorily required) but who had a sense of community obligation and an understanding of the needs that are going to be brought before the court.

So, it seems to me he brings to this court three important criteria.

One, he has a deep background and knowledge, having served I believe 11 years, if I am not mistaken, in the military. Was it that long?

Mr. **Mankin**. Including Reserves, yes.

Senator **Biden**. Including Reserves.

Second, he is an accomplished attorney.

And third, he has been so deeply and extensively active with his family in our community and, as Senator Roth says, in Senator Roth's State of Delaware. [Laughter.]

I am only kidding, Bill. [Laughter.]

Senator **Roth**. All right.

Senator **Biden**. He still is my senior Senator, and I better be very careful.

But at any rate, in recognition of his numerous civic contributions, Mr. Mankin received a certificate of appreciation from the Delaware State Chamber of Commerce in 1984, and the Order of Excellence Award from the Delaware State Board of Education just last year.

I will not presume to speak for Mr. Mankin, but my guess is that the awards do not mean as much to him as the service itself. He has dedicated his life to helping others in our State, and the spirit of that dedication is captured, he says, in the words of Anne Morrow Lindbergh—words worth repeating: "My life cannot implement in action the demands of all the people to whom my heart responds."

I think what we need on this court—maybe as much as or more than any court in the country—is someone who understands not only the law, but the frustrations, concerns, and problems that are faced by those who come before the court.

Mr. Chairman, the call to Government service has once again extended itself to Hart Mankin, and I hope this committee and the full Senate will approve his nomination to be an Associate Judge on the Court of Veterans Appeals, which, as I said, is a court that we take very, very seriously. I think he is particularly suited to do the job on that court, and I am happy to recommend him to you and hopefully very swiftly to the Senate as a whole.

[The prepared statement of Senator Biden appears on p. 17.]

Chairman **Cranston**. Thank you very much.

Senator **Roth**. Mr. Chairman.

Chairman **Cranston**. Are you having second thoughts? [Laughter.]

Senator **Roth**. No, no, no. Only stronger.

I would just ask that my full statement be included as part of the record.

Chairman **Cranston**. Of course.

Senator **Roth**. Thank you, Mr. Chairman.

Senator **Biden**. Thank you very much, Mr. Chairman.

Chairman **Cranston**. We understand the two of you have other commitments. So, we will understand if you leave.

Senator **Biden**. Yes. I am going up to the committee which I chair, which maybe Hart will be sent to at another time for another post. There will be Supreme Court vacancies I understand soon, and I imagine they will be looking for Republicans, not Democrats.

Thank you very much, Mr. Chairman.

Chairman CRANSTON. Thank you very much.

I will now go on with my statement.

The two nominees might come forward to the table now, if you would.

OPENING STATEMENT OF CHAIRMAN CRANSTON

The two nominations and the nominees who are before us today will, if confirmed, bring to five the number of judges sitting on the Court of Veterans Appeals. This hearing comes on the heels of yet another significant milestone in our 14 year battle to provide judicial review of VA decisions denying benefits claims. Just yesterday the court heard its first oral argument.

It has been especially gratifying to me and to the other members of this committee to witness the development of the court. For all of us here and for veterans across the Nation, the court's existence embodies our Nation's commitment to providing to all who have answered the call a full measure of justice in their relations with their Government.

The two nominees have distinguished backgrounds which should ensure their success as Associate Judges of the court. The two Senators who just spoke gave a good bit of detail about one of you.

Hart Mankin received his undergraduate degree from the University of the South and his law degree from the University of Houston. He served in the U.S. Air Force Reserve for 12 years, and he was discharged as a captain in 1965. His last Reserve assignment was as a Judge Advocate General's area representative.

His professional career has included considerable time as a practicing attorney in the private sector as well as two stints in Federal service: from 1969 to 1971, as general counsel for the General Services Administration where he was honored by a special achievement award; and from 1971 to 1973, as general counsel for the Department of the Navy where he received a distinguished public service award. From 1973 to 1989 he was with the Columbia Gas System Service Corp., a registered public utility holding company in Wilmington, DE, where he served as vice president and assistant general counsel, later as general counsel. Following his retirement from Columbia Gas, he joined the faculty of the Widener University School of Law in Wilmington as an adjunct professor of law.

Hart Mankin has also devoted significant time and energy to many civic organizations, including the Delaware Humanities Council, the Delaware State Chamber of Commerce, and the American Center for Enterprise Education.

Ronald Holdaway's qualifications are in a different arena and equally as impressive. He received both his undergraduate and law degrees from the University of Wyoming. He retired in 1989 from the U.S. Army as a brigadier general in the JAG Corps after 33 years of distinguished service. During his long service, he gained substantial experience with the broad range of legal problems and issues to which service personnel and their families are exposed.

During his Army career he served as Judge Advocate for the U.S. Army in Europe, Assistant Judge Advocate General for Civil Law, and the Executive Officer to the Judge Advocate General. He also taught criminal law in the JAG school, and from 1969 to 1970 served as Staff Judge Advocate for the 1st Calvary Division in Vietnam.

His military education has included attendance at the National Defense University, the U.S. Army Command & General Staff College, and the Judge Advocate General's School. He has received two Distinguished Service Medals, the Legion of Merit, the Bronze Star, the Meritorious Service Medal, the Air Medal, the Army Commendation Medal, the Vietnam Service Medal, and the Vietnam Campaign Medal with four campaign stars.

His last assignments were as Commander of the U.S. Army Legal Services Agency and Chief Judge of the U.S. Army Court of Military Review, the Army's highest appellate tribunal. His experience on this Army court should serve him well on the Court of Veterans Appeals.

Before I close, I note that some unresolved business from Chief Judge Frank Nebeker's May 1989 confirmation hearing has recently been concluded. At that hearing, I expressed concern over Judge Nebeker's associate membership in the Lawyers' Club, an organization which, at the time of the hearing, had never admitted a woman to membership. Judge Nebeker told us prior to and at the hearing that he was actively working to bring about the admission of women to the club, and that he expected a change in the club's membership policy in the near future. He promised to report back to the committee in this regard by the end of the year.

I was pleased then to receive a letter several weeks ago from Judge Nebeker informing me that the Lawyers' Club had last December voted a number of women to full membership or, in the case of judges, to associate membership. A successful resolution of this problem is most welcome and I congratulate Judge Nebeker in his efforts toward ensuring fair treatment regardless of race, sex, religion, or national origin. We will print his recent letter in the hearing record at this point.

[The letter follows:]

U.S. COURT OF VETERANS APPEALS,
WASHINGTON, DC,
January 10, 1990.

Hon. ALAN CRANSTON,
Chairman, Committee on Veterans' Affairs,
U.S. Senate,
Washington, DC

DEAR MR. CHAIRMAN: During my confirmation hearing last year you expressed a desire to be advised about whether the Lawyers' Club, to which I belong, would change its all male membership policy. I speculated that the change, worked from within over the past few years, would happen in the fall of 1989. I proved wrong by a month or so. In any event, the Club voted a number of women to full membership or, as judges, to associate membership in December and the announcement of that fact was made this month.

I trust this satisfies your interest and vindicates our view that change of this kind can and will occur in the absence of external force.

Sincerely,

FRANK Q. NEBEKER,
Chief Judge.

Chairman CRANSTON. I also note that on January 31, the committee received the nomination of Donald Ivers, the former general counsel of VA, to be an Associate Judge on the court. My congratulations to Mr. Ivers.

In closing, I note that each of the nominees has completed the committee's basic questionnaire for Presidential nominees and the extensive special questionnaire for judicial nominees, all of which will be printed in the hearing record, along with two letters from the Office of Government Ethics, dated October 27, 1989, and January 31, 1990, to the effect that each nominee is in compliance with applicable laws and regulations governing conflicts of interest.

The published writings of both nominees have also been reviewed by committee staff, and I have reviewed the FBI reports on the nominees and have found no bar to their confirmation in these reports.

I want to note that Senator Simpson had intended to be here this morning to introduce his long-time friend, Ronald Holdaway. Unfortunately, Senator Simpson is presenting the eulogy at the funeral of former Wyoming Governor Ed Herschler, and is unable to be here.

He has a statement which I would like to give on his behalf at this point. This is a statement which I will read because it is quite brief.

PREPARED STATEMENT OF SENATOR SIMPSON

Mr. Chairman, I had so very much wanted to appear on the other side of the table from you this morning to introduce my old friend and compatriot, Ron Holdaway, who has been nominated by the President to be a judge on the Court of Veterans Appeals. I am simply unable to do so since I must be in Wyoming today on the sad mission of attending the funeral of our former Governor, Ed Herschler. I am honored that the family has requested me to give the eulogy at the service. I know that Ron understands, and I appreciate your consideration in allowing me to submit these remarks for the record.

Ron Holdaway is an individual eminently and totally well-qualified for a position on this court. He is a thoughtful, serious, dedicated man. He is a native of my home State of Wyoming, and he and I attended the University of Wyoming together for a time. We were in the same ROTC outfit. He received his history degree in 1957 and his law degree in 1959. We also shared the law school experience. His academic career was very distinguished. As an undergraduate history student, he received the history book award for the highest grades in the department. As a law student, he was outstanding and also served as a member of the Board of Editors of the Wyoming Law Journal.

His military/legal career has been a singularly distinguished one, from his service as a legal staff officer through his assignment as Judge Advocate for the U.S. Army in Europe and finally as Chief Judge at the U.S. Army Court of Military Review. He has received numerous medals and awards recognizing his professional skills and exemplary service, including a service term in a combat theatre in Vietnam.

General Holdaway retired this past year after a most impressive career, and he will bring to his new position a unique understanding and ability. It will be pleasing for me to know that the Court of Veterans Appeals, and therefore the entire judicial review process, has available to it the skill, expertise, and great good sense of this fine man, my near lifelong friend, Ron Holdaway. I commend him to you wholeheartedly and without reservation.

I wish him every success in the confirmation process, and I am confident that his ability, integrity, and qualifications will soon be, if not already, so very apparent to all the members of the committee. I extend my greetings and best wishes to Ron's steady and able wife Judy and to their two lovely daughters, Denise and Georgia.

Thank you for permitting me this opportunity, Mr. Chairman.

That is a very fine statement from a very fine man, Alan Simpson.

Now, pursuant to the rules of the committee, all nominees are asked to testify under oath. So, Hart and Ron, would you please both stand and raise your right hand?

Do you each swear or affirm that the testimony you will give to this committee at this hearing today and any written answers or statements you provide to this committee in connection with this hearing will be the truth, the whole truth and nothing but the truth?

Mr. **MANKIN**. I do.

Mr. **HOLDAWAY**. I do.

Chairman **CRANSTON**. Thank you very much.

Now, if you care to make brief remarks before we begin some questions this morning, the committee would be glad to hear from you at this time. Hart, would you like to make a brief statement to start?

TESTIMONY OF HART T. MANKIN, NOMINEE TO BE ASSOCIATE JUDGE OF THE U.S. COURT OF VETERANS APPEALS

Mr. **MANKIN**. Thank you, Mr. Chairman.

Mr. Chairman, my name is Hart T. Mankin. I am here to respond to your questions concerning my nomination to be an Associate Judge of the U.S. Court of Veterans Appeals. I am especially pleased to have some of my family with me this morning: my wife Ruth, and our daughter Margaret. Our son Ted, as the chairman indicated, of California and our other daughter Susan of Florida were, unfortunately, unable to be here.

At this point, I would like to reflect the gratitude for the deep honor accorded me by the appearance of Senators Roth and Biden this morning. I am, indeed, honored by their presence.

As the committee has seen, my career in the law has taken me down many paths. None of those paths has offered the challenges that I would face on the Court of Veterans Appeals.

I would like to join the many others who have commended you for opening the doors of justice to a large and deserving group of Americans heretofore largely denied the full exercise of their rights. Learned Hand once observed, the first commandment for lawyers must be: "Thou shall not ration justice." I look forward to providing justice for veterans. It has been said that "an abiding precept of our honored and learned profession is to insure access to our country's legal system."

At long last the doors of the courthouse are open to those who have served their country so well. To be a part of that chapter in the American legal system is a privilege and an honor.

I will be pleased to respond to your questions, Mr. Chairman.

Chairman CRANSTON. Thank you very much.

Ron.

TESTIMONY OF RONALD M. HOLDAWAY, NOMINEE TO BE ASSOCIATE JUDGE OF THE U.S. COURT OF VETERANS APPEALS

Mr. HOLDAWAY. Thank you, Mr. Chairman.

I would first like to say that I deeply appreciate the statement read into the record from Senator Simpson, a very good friend and I think a very great man. I understand completely why he is not here. Governor Herschler is someone I also knew very slightly, but a very fine man.

I am deeply honored to be here, and I am honored by the President's nomination. And I, of course, hope that the Senate will see fit to confirm the President's judgment.

My record is before you. I believe it shows I am qualified for this high position, but I of course realize that decision is in your hands.

If the judgment of the Senate is to confirm the nomination, I pledge to the President, the Senate and, most importantly, the veterans of this Nation my full energies and ability.

It has been my honor and privilege to serve my country as a soldier, a lawyer, and a military judge for more than 30 years. I can think of nothing I would rather do than to use the ability and experience I have gained as a soldier, lawyer, and judge in the continued service to this great Nation.

Thank you, Mr. Chairman.

Chairman CRANSTON. Thank you both very much for those fine and concise opening statements.

At the outset I have three questions to which I would like each of you to respond.

First, for each of you—and we will ask Hart to answer first—what is your concept of the nature and extent of the Federal Government's obligation to the Nation's veterans and their dependents and survivors?

Mr. MANKIN. The Congress in its wisdom has afforded various benefits to the veterans whether they be for educational purposes or for health purposes. The point of this law that you passed in 1988 is to assure that the veterans get the full measure of those benefits that have been accorded to them.

Chairman CRANSTON. Thank you very much.

Ron, would you comment?

Mr. HOLDAWAY. Well, first I'll start out by concurring with Hart. [Laughter.]

Certainly the Nation owes to our veterans the benefits that Congress has seen fit to confer on them. Military service, whether it is for 2 years or 20 years or 30 years, creates dislocations in people's lives. And the Government does owe veterans a deep debt of gratitude and, when necessary, the benefits from that service. And I think the court, the establishment of the new court, certainly is a way of ensuring that the intent of Congress be complied with in the administration of these benefits.

Chairman CRANSTON. I thank you both.

Ron, let me address this next question to you first.

What are your views on the deference that an appellate tribunal should give to the conclusions and reasoning of an executive branch agency in deciding a claim for benefits from that agency?

Mr. HOLDAWAY. Well, I would analogize that to the deference that any appellate court in our system gives to the fact finder below. Whether it is a jury in a regular system or an administrative file, you do owe deference to those below who have determined the facts.

However, this deference ought not to be such that you automatically concur and go along with the findings below. An appellate court has to take a look at the record, the entire record, and determine in its own mind that the findings below were based on an adequate investigation and that the facts below have been found in a fair way.

Chairman CRANSTON. What about on questions of law?

Mr. HOLDAWAY. Well, no. I think on questions of law, at least in the system set up here—and I would analogize it to the Court of Military Appeals' system I am more familiar with—is the Court of Military Appeals and in our case or in this case, the Court of Veterans Appeals, determines the law. And the law as determined below—I don't think you owe a great deal of deference to the determination below as to the law. That's the job of the Court of Veterans Appeals.

Chairman CRANSTON. On the third question that I will address to each of you, I will go back to Hart. Would you ever have any hesitancy in reversing an unlawful VA action in a case that is within the jurisdiction of the Court of Veterans Appeals and properly before the court?

Mr. MANKIN. Absolutely not.

Chairman CRANSTON. Ron?

Mr. HOLDAWAY. None whatever.

Chairman CRANSTON. Hart, on the second question, I guess we didn't get your answer.

Mr. MANKIN. The guidance of the law is very clear. This court is the determiner of the law. Deference to the BVA on questions of law is gainsaid by the statute itself. On questions of fact, again the law gives us guidance, the clearly erroneous test. And for risk of sounding a little bit like pick and peck——

[Laughter.]

Mr. MANKIN [continuing]. I concur in part of what Mr. Holdaway said. On the other hand, the guidance of the statute is fairly clear on both those points in that question, Mr. Chairman.

Chairman CRANSTON. Thank you.

I want to welcome Frank Murkowski, my partner in this enterprise on this committee and the ranking Republican member, for any remarks you have, Frank.

OPENING STATEMENT OF SENATOR MURKOWSKI

Senator **Murkowski**. Thank you, Mr. Chairman. I know the opening statements have already been read. I think that we would all agree the caliber and qualifications of the two gentlemen are of the highest accord, and I am not going to read my opening statement, but ask that it be put in the record.

[The prepared statement of Senator Murkowski appears on p. 18.]

Senator **Murkowski**. I gather that Senator Simpson is out in Wyoming for the funeral of his late Governor, so as a consequence, he wanted me to be sure and mention to Mr. Holdaway his regrets in not being able to introduce him.

I believe Senator Roth has already introduced you Mr. Mankin. I ran into Senator Roth's legislative person out in the hall.

The ladies I gather have been introduced, but I think it is always appropriate to again recognize Ruth Mankin and Judy Holdaway. Nod your head so I know who you are, please. And the Mankins have a daughter Margaret. There is Margaret at the end.

That takes care of page 2 of my statement. [Laughter.]

And the rest I am sure, Mr. Chairman, has been repeated by you and others.

Chairman **Cranston**. Yes, several times. [Laughter.]

Senator **Murkowski**. So, I will not say that I am not going to say this.

Gentlemen, we wish you well and look forward to the initiation of your new duties.

Thank you.

Chairman **Cranston**. Frank, if you have any questions, I would be glad to yield to you for that purpose.

Senator **Murkowski**. I don't think so. I guess I do now that you mention it.

I was just thinking, which is always dangerous when you read these staff memorandums late at night, what is the budget anticipated to be for the appeals board? Do we know?

Chairman **Cranston**. It's $8.9 million for the next fiscal year.

Senator **Murkowski**. So, it is out of the billion dollars that we have theoretically, additional funding for the VA, we are going to take $8.9 million and expend it on the appeals process. This is separate funding.

Chairman **Cranston**. It is not part of the VA budget.

Senator **Murkowski**. It's a part of what budget?

Chairman **Cranston**. It's just a separate, independent budget for this purpose.

Senator **Murkowski**. Yes, but it comes out of what? I am just curious. If it isn't part of the VA budget, I guess the question, why isn't it, and if it isn't there, it must be out of somebody else's budget. Is it the Justice Department budget? It comes out of somebody's budget.

Chairman **Cranston**. The courts get a separate budget from the Congress.

Senator **Murkowski**. From the Justice Department?

Chairman **Cranston**. No, just separate. It is not put in VA because it is supposed to judge VA.

Senator MURKOWSKI. Right. But I was curious to know is it just simply a Federal courts budget.

Chairman CRANSTON. It is not part of any other budget. Like the NLRB has its own budget, this has its own budget.

Senator MURKOWSKI. OK. If we wanted to find out in whose budget it is in, we would go where?

Chairman CRANSTON. To us. It's our budget, the budget, the President's budget and the Congress' budget.

Senator MURKOWSKI. Yes, but if you look for the line item, it would be under court budgets?

Chairman CRANSTON. Under this Court of Veterans Appeals budget.

Senator MURKOWSKI. And that's a line item out of whose overall budget?

Chairman CRANSTON. The United States' overall budget.

Senator MURKOWSKI. OK, but is it the White House budget, the President's budget?

Chairman CRANSTON. The one that the President submits, Congress works on and submits back to the President in appropriations bills and the President signs them. It is the joint budget between the Congress and the President. It becomes the budget of the United States.

Senator MURKOWSKI. Well, I am not going to pursue that question anymore because I think we are getting the process of education as we go along. But I am going to ask my side to do a little research so I can see the overall budget is X and this is $8.9 million out of that to fund the appeals court, or whatever.

What do we anticipate will be the present deficit?

Chairman CRANSTON. What is it?

Senator MURKOWSKI. It's $3.4 trillion. When I came here in 1980—that was not very long ago—it was $757 billion.

Chairman CRANSTON. Why did you let that happen? [Laughter.]

Senator MURKOWSKI. Well, it takes two to tango, my friend. And that's what the President always says. Hey, Congress does all the appropriations. So, anyway we have both heard that from different sides.

What is the implication of what the liability will be to the Federal Government as a result of the claims that you gentlemen are going to be adjudicating, addressing, resolving?

Mr. HOLDAWAY. Well, presumably the claims that have been paid in the past. I wouldn't think the court has any impact on the amount of claims necessarily. Those claims would have been adjudicated anyway. We are just a separate level of appeal, the final appeal so-called, but it would be hard to judge how much impact that is going to have on how much is paid out.

Mr. MANKIN. I would imagine that the Department itself has some sort of projected fund for paying claims at a projected level that their analysts and planners do.

I agree. I do not see how the court could necessarily expand upon that.

Senator MURKOWSKI. Well, my question is a leading one. I am under the impression that before there were limitations on the veterans' appeals process, and I am not totally conversant on that. But by setting up this system, we are giving our veterans an opportunity to move through an appeals process, and my question is ultimately this is going to cost more than what we were settling for before. But it is much more democratic.

Mr. **MANKIN**. Well, insofar as that statement goes, that is clearly correct.

The limitations on the veterans' ability to exercise their rights were, of course, twofold. They were limited to the fact that there was for all intents and purposes no judicial review of a BVA decision. The other thing was the infamous $10 limit on attorney's fees.

Now, clearly with the avenue of a court open and the raising of the limitation on the attorney's fees, which would encourage veterans to at least utilize the system that is set up for them and has been set up for them by the Congress, there may be and there will presumably be more expense at the Department for the lawyers to represent the Department at the court. But I do not believe that that would be in the court's budget. That would be in the Departmental budget, however they handle appellate review before the U.S. Court of Veterans Appeals.

Senator **MURKOWSKI**. OK. So, there will be further pressure on the VA budget for professional fees, lawyers, so forth.

Mr. **MANKIN**. I obviously haven't studied the Department's budget. I have no idea what their pressures would be. The fact of the matter is they must recognize it and how they recognize it is their particular budgetary process problem.

Senator **MURKOWSKI**. Now, the settlements. Before the settlements have been rather modest because a veteran has never had a real process. Now he has a process when he seeks damages, and you folks award the damages. People in the back are shaking their heads both ways.

Where does the money come from? Do we just write a check and add it to the deficit? Is it budgeted?

Chairman **CRANSTON**. I do not think we can automatically assume that we are going to find that there should be more lenient awards than have been coming from the present process. We will just wait and see on that subject.

So, VA's attorney costs are the only certain increase, and that is not going to be immense. And the VA itself has already hired attorneys to represent it in the court. That is in their budget.

Senator **MURKOWSKI**. Aren't we taking, in effect, a cap off the rights of veterans under some interpretation?

Chairman **CRANSTON**. No.

Senator **MURKOWSKI**. It's another appeal.

Mr. **PTAK**. It's another step to appeal.

Chairman **CRANSTON**. There is no cap taken off of it. They have always had a right to seek maximum benefits.

Senator **MURKOWSKI**. OK. Then the logic is that the reason they didn't is because they couldn't get an attorney to take it for $10?

Chairman **CRANSTON**. Well, no. It was basically a view they were entitled to a counsel to represent them and give them the feeling that they would get the best representation possible and the right to go before an independent tribunal such as we have now set up. They will then have greater confidence in the decision.

Senator **MURKOWSKI**. As opposed to what it was before when veterans just appealed to the VA itself. Now they are appealing to an independent group of experienced judicial experts who will evaluate. But what you are telling me then is it doesn't necessarily imply that you are going to have more adjudication or pressure to make more monetary settlements than were associated before, although I am not really too sure of that.

It seems to me if you have a formal process which is a good thing, obviously more people are going to use it. And so, it could very well ultimately mean that there will be an expeditious settlement as a consequence of your reviewing the appeal process and getting settlements out, while before your veteran just went to the VA, beat his head against the wall, and might have gotten something and might not.

I am sure you have looked at the history of how it worked before.

Mr. MANKIN. Well, that may have been the perception of past conduct at the VA. But the veterans' rights are determined by law and regulation.

The court won't liberalize the amounts involved. And you are talking about dollars I think. They are set. The rights, the entitlements, based on legal questions is what this court will determine, not an increase in dollar amounts of fixed benefits.

Mr. HOLDAWAY. Presumably veterans will make claims and receive the benefits that they are entitled to under the law. The court is just designed to ensure a fairer way that that happens. They won't be entitled to any more money than they were entitled to before.

Senator MURKOWSKI. I think that satisfies my questions. Thank you, Mr. Chairman. I thank the gentlemen.

Chairman CRANSTON. Thank you, Frank.

I do have a few more questions. These will be directed for a bit to one or the other of you, but not to both.

Hart, in response to a question about memberships in certain organizations that is asked of all nominees for the U.S. Court of Veterans Appeals, you stated that you have been since 1973 a member of the University and Whist Club of Wilmington and noted that the club had until 1988 limited female membership.

As I mentioned in my opening remarks, I was very pleased to learn recently that the Lawyers' Club, of which Chief Judge Nebeker is a member, had last December voted a number of women to full membership and associate membership.

I would like to ask first what does the term "limited female membership" in your response mean.

Mr. MANKIN. Female members of the University and Whist Club of Wilmington, were allowed membership status if their husbands had been members of the club and they were widowed or divorced. That was the limitation on women membership.

If I might add a note to your question, the membership of the University and Whist Club was provided to me by my employer who paid the dues. It is a club that was principally used for luncheon meetings in Wilmington. I chose not to get involved in club politics. I have no interest in that.

There were, indeed, membership votes on the admission of women, and as my response to you all indicates, I voted in those.

Chairman CRANSTON. You what?

Mr. MANKIN. I voted at that time for the admission of women every time there was a vote.

As my statement also reflects, I sponsored one of the first two women to be made full members of the club. I am very proud of that.

I have resigned from the University and Whist Club effective February 28 of this year.

Chairman CRANSTON. Thank you very much.

Ron, a review of the 24 opinions you provided to the committee from your tenure as Chief Judge of the Army Court of Military Review shows that in 15 of the cases you voted with the majority to sustain entirely the conviction handed down by the court-martial, and in eight others you voted with the majority to sustain the conviction in part. In only one case did you vote, as did the other two judges on that case, to set aside the entire decision and order a complete rehearing.

So, I would like to ask does this record generally accord with the basic proportion of affirmances and reversals by the Army Court of Military Review; that is, rejection in whole or in part of appellants' appeals in over 95 percent of the cases. Is that the way it generally goes?

Mr. HOLDAWAY. Senator, I would have to go back and look at the statistics. I couldn't say it did and I couldn't say it didn't. I think it would be roughly in accord with the percentage of the cases.

Chairman CRANSTON. I can understand your uncertainty about the exact figures.

Without getting into the correctness of the individual decisions reached in 23 of those case in which you participated, do you believe that the consistency in affirming the court-martial convictions, taken together with your 33 years of military service, indicate or might be seen by VA claimants as indicating any sort of pro-Government bias on your part?

Mr. HOLDAWAY. Well, I don't think so. I obviously can't speak for every claimant that might come before the court. I would be willing to put on my entire record as a Judge Advocate for anybody what I have done over the years. I spent 7 years as a defense counsel, by the way. The first 7 years in the Army I was predominantly a defense counsel. So, I have been on both sides of that. And I suspect I have defended more soldiers than most people who have served in the Judge Advocate General's Corps. And I would like that added into the equation as well.

Also, as a Staff Judge Advocate, many times I took cases up to the commanding general recommending that there be no trial. And, of course, that's a negative statistic. There is nothing that I can give you that shows you that. That is just a negative statistic.

And in other cases after trials in the field when I was a Staff Judge Advocate, I went to the commanding general and recommended either that certain charges be dismissed notwithstanding the verdict of the court-martial, or in other instances, recommended a modification of the sentence of the court-martial, a modification downward, of course. You can't modify it upward in the military. And those again are negative statistics.

But I never considered myself particularly a Government man, although a Staff Judge Advocate in the very nature of things is somewhat of a prosecutor. You are a prosecutor who looks at things trying to get a balance in the system.

Chairman CRANSTON. I think that is a very good answer, and that should give confidence in your independence of judgment to those who will be coming before you.

Hart, an analogous question for you. Do you believe that your work as a top attorney for the General Services Administration and later for the Navy left you with a proexecutive branch bias or what might be perceived as such a bias?

Mr. MANKIN. I hope it didn't, and I hope that is not a perception. What is important for this court is that it provide justice and that it be perceived to apply justice. I would hope that merely because of my past Government service, there is not a perception that I am, indeed, pro-Department of Veterans Affairs. That is not the case.

You must view each case on its merits.

Chairman CRANSTON. Well, that too is a good answer, and it is for those reasons that I asked these questions to try to clear any clouds that might exist in anybody's mind. And I think you have both done so.

My last question is for both of you. I will turn to you first, Ron. Would you please describe the aspects of your record that would lead a veteran or veteran's dependent or survivor seeking assistance from the Federal Government to believe that you would give his or her case sympathetic consideration? Anything you want to add beyond what you said in response to my last question?

Mr. HOLDAWAY. Well, I just think over and above that, I think someone who has served in the military who has a feeling and an understanding of military life would give a veteran confidence whether the veteran is a veteran of—let's say, someone who has served 2 years or someone who has served 20, someone who served 30 years. And we have all sorts of veterans. But I think someone who has a bit of a feel for the military kind of existence would give a veteran confidence I would think.

Chairman CRANSTON. Same question, Hart.

Mr. MANKIN. Mr. Chairman, I will adopt the last answer that I gave to your question with one brief addition.

My legal record is spread before the public now on all these questionnaires. I will stand on my record and what I have done in my career.

Chairman CRANSTON. Thank you very much. I think that concludes our hearing. I want to thank you both for your very fine responses. We think they will be very helpful for our committee record and for the future of the court and your participation on it.

We now stand adjourned.

Senator MURKOWSKI. Mr. Chairman.

Chairman CRANSTON. Yes?

Senator MURKOWSKI. Senator Thurmond has a statement which he would like entered in the record.

Chairman CRANSTON. Of course.

[The prepared statement of Senator Thurmond appears on p. 19.]

Chairman CRANSTON. Thank you all. We stand adjourned.

[Whereupon, at 10:25 a.m., the committee was adjourned, to reconvene at the call of the Chair.]

APPENDIX

PREPARED STATEMENT OF SENATOR WILLIAM V. ROTH, JR.

Mr. Chairman, members of the committee, I am pleased to have this opportunity to come before you. Today, I come before this distinguished committee to present a friend and fellow Delawarean—Hart Mankin, one of the President's nominees to serve as an associate judge on the newly created U.S. Court of Veterans Appeals.

I am honored to be able to present Hart to the committee. He is an individual who has served the people of Delaware and others throughout this country for many years. Hart's service to our nation began while in the Air Force. In 1954, he entered the Armed Forces and his diligent service earned him the rank of Captain before his honorable discharge in April, 1965.

While in the military, Hart began work towards a law degree at the University of Houston. Upon successful completion of his studies, he started what was to become a very distinguished career in the legal profession.

During the 1970's, Hart returned to the public sector to work as general counsel with the United States Services Administration and the Department of the Navy. He was the proud recipient of the Special Achievement Award and the Distinguished Public Service Award while serving in these two capacities. Following these positions, he moved into the private sector, working as general counsel at Columbia Gas Corporation in Wilmington, Delaware.

Hart has always taken a genuine interest in community activities. He has served in numerous professional and civic organizations. Currently, he is a member of the Federal, American, District of Columbia, and Delaware State Bar Associations. Other group activities have included service with the Advisory Council on Volunteer Services, the Hugh O'Brien Leadership Foundation, and the American Academy of Political and Social Science. Furthermore, he is currently a member of the Army and Navy Club and the American Legion.

I highly recommend Hart for this position on the Court of Veterans Appeals. He has displayed great determination and skill throughout his professional career, and I believe that he would be a great asset to the court.

Thank you very much, Mr. Chairman.

PREPARED STATEMENT OF SENATOR JOSEPH R. BIDEN, JR.

Mr. Chairman, I thank you and the Committee for giving me this opportunity today to introduce Mr. Hart Mankin, nominee for Associate Judge on the U.S. Court of Veterans Appeals. Although Mr. Mankin and I are from different political parties, I wholeheartedly endorse President Bush's selection.

In my role as Chairman of the Senate Judiciary Committee, I review hundreds of appointments to the federal bench each year. While this judgeship does not fall under the jurisdiction of the Judiciary Committee, I have, nonetheless, enjoyed reviewing this one additional appointment.

We all know how important the activities of the Court of Veterans Appeals are to America's veterans. Created in 1988, this court finally gives veterans the same rights as so many millions of other Americans—the right to petition the courts "for a redress of grievances." For the first time, veterans have the right of review by an impartial judiciary, and that makes it especially important that we have qualified people sitting on the Court of Veterans Appeals. Hart Mankin's record of service and experience demonstrates that he would be a valuable addition to the court.

He is a highly respected attorney. He himself served in the military, was once a member of the American Legion, and acted as General Counsel for the Department of the Navy in the early 1970s.

If there is one thing that runs throughout Mr. Mankin's career—perhaps what impresses me the most—is his dedicated service to community and country.

Shortly after finishing his undergraduate work at the University of the South in 1954, Mr. Mankin was commissioned as a Seccond Lieutenant in the Air Force Reserves. Eleven years later, he was honorably discharged as a Captain. While a member of the Air Force Reserves, Mr. Mankin went to law school and began his distinguished legal career, including opening his own practice in Houston.

In 1969, Mr. Mankin became General Counsel for the General Services Administration and then held the same position for the Navy. But, he didn't just serve in the government, he served with distinction. In 1970, Mr. Mankin was given the Special Achievement Award by the GSA, and in 1973, he was named a recipient of the Distinguished Public Service Award.

After four and a half years of government service, Mr. Mankin then returned to the private sector as a Counsel with the Columbia Gas System Service Corporation in Wilmington. But his service to the people of Delaware and to the United States did not stop. He was a member of the Delaware Humanities Council and served a tenure as its chairman and director. He has testified here in Congress in support of funding for the National Endowment for the Humanities. He was also a member of the American Center for Enterprise Education, again serving a term as chairman and director. He was the General Counsel for the Committee on the Purchase of Blind Made Products. He regularly volunteers at the Episcopal Church Home in Wilmington. And, to encourage others to give something back to their community, Mr. Mankin chaired the Advisory Council on Volunteer Services for the State of Delaware.

In recognition of his numerous civic contributions, Mr. Mankin received a certificate of appreciation from the Delaware State Chamber of Commerce in 1984 and the Order of Excellence Award from the Delaware State Board of Education just last year.

I will not presume to speak for Mr. Mankin, but my guess is that the awards do not mean as much to him as the service itself. For he has dedicated his life to helping others. The spirit of that dedication is captured, he says, in the words of Anne Morrow Lindbergh—words worth repeating now: "My life cannot implement in action the demands of all the people to whom my heart responds."

Mr. Chairman, the call of government service has once again been extended to Hart Mankin, and I hope this committee and the full Senate will approve his nomination to be an Associate Judge on the Court of Veterans Appeals.

PREPARED STATEMENT OF SENATOR FRANK H. MURKOWSKI

Good Morning.

It's with pleasure that I welcome Hart T. Mankin of Delaware and Ronald M. Holdaway of Wyoming to this hearing. They have been nominated by the President to be Associate Judges on the Court of Veterans Appeals, and, if confirmed, will bring the number of judges on the Court to five, nearing the full complement of seven.

I would also like to welcome Hart Mankin's wife Ruth and their daughter Margaret, and Ron Holdaway's wife Judy who is present with him. Welcome to all of you.

Both nominees come before this Committee with a background of exceptional service to our Nation:

HART MANKIN

Served as an officer in the U.S. Air Force Reserve from July 1954 to April 1965;

Is a lawyer who served with distinction as General Counsel for the U.S. Department of the Navy for two years and for the U.S. General Services Administration for another two;

Held positions of authority and trust in several educational, philanthropic, and governmental organizations; and

Has lectured and written extensively in the areas of law, politics, theology, and ethics.

RONALD HOLDAWAY

Served approximately 30 years in the U.S. Army as a soldier-lawyer-judge, rising through the officer ranks to attain the rank of Brigadier General;

Devoted his primary professional efforts during his military career to addressing the diverse and complex legal problems confronting the Army in all aspects of civil, military, and criminal law, both here in the U.S. and abroad; and

Has wide experiences in the courtroom at the trial and appelate level. His last assignment was that of Chief Judge of the Army Court of Military Review, the highest Army tribunal.

I have examined the background and records of both of these distinguished nominees, and I believe that their confirmation will be in the best interests of our Country and our veterans.

I urge my colleagues to join me in supporting their confirmation.

PREPARED STATEMENT OF SENATOR STROM THURMOND

Mr. Chairman, it is a pleasure to be here this morning to continue in our consideration of nominees to the Court of Veterans Appeals. The two nominees before the Committee today—Ronald Holdaway and Hart Mankin—will both be great additions to the three judges currently sitting on the court. I am pleased to offer my support.

A native of Wyoming, Mr. Holdaway graduated from the University of Wyoming Law School in 1959. As an attorney, he has served his Country in numerous capacities in the Judge Advocate General's Corps. Most recently, from 1983-87 he served as The Judge Advocate in Heidelberg, Germany, and from 1987-89, he served as Commander of the U.S. Army Legal Services Agency and Chief Judge on the U.S. Army Court of Military Review in Falls Church, Virginia. He is a recipient of the Legion of Merit, the Bronze Star Medal, and the Meritorious Service Medal. His outstanding record should serve him well as an associate judge.

Our second nominee, Mr. Hart Mankin, is a graduate of the University of the South, and received his law degree from the University of Houston in 1960. After practicing for eight years in Texas, Mr. Mankin later went on to serve his Country as General Counsel for the Department of the Navy. He has also served as General Counsel of the Columbia Gas System Service Corporation, and most recently served as Adjunct Professor at the Widener University School of Law in Wilmington, Delaware.

Mr. Chairman, I am pleased to offer my support to each of these nominees. At this time, I must leave for another meeting.

STATEMENT FOR COMPLETION BY PRESIDENTIAL NOMINEES

PART I: ALL THE INFORMATION IN THIS PART WILL BE MADE PUBLIC

Name: Mankin (LAST) Hart (FIRST) T. (OTHER)

Present address: 1101 Westover Road Wilmington (CITY) DE (STATE) 19807 (ZIP CODE)

Position to which nominated: Associate Judge, United States Court of Veterans Appeals

Date of nomination: September 29, 1989

Date of birth: 26 (DAY) Dec. (MONTH) 1933 (YEAR)

Place of birth: Cleveland, Ohio

Marital status: Married

Full name of spouse: Ruth L. Mankin

Names and ages of children:
Margaret R. Mankin (33)
Theodore H. Mankin (29)
Susan R. Mankin (27)

Education:

Institution (including city and State)	Dates attended	Degrees received	Dates of degrees
Public Schools of Evanston, IL	1938-1947		
Evanston Twp. High School Evanston, IL	1947-1950		
Northwestern University Evanston, IL	1950-1952		
The University of the South Sewanee, TN	1952-1954	B.A.	1954
The University of Houston Houston, TX	1957-1960	J.D.	1960
The University of the South	1977-1981	Certificate in Education for Ministry	1981

Honors and awards: List below all scholarships, fellowships, honorary degrees, military medals, honorary society memberships, and any other special recognitions for outstanding service or achievement.

Special Achievement Award - General Services Administration - 1970

Distinguished Public Service Award - Department of the Navy - 1973

Certificate of Appreciation - Delaware State Chamber of Commerce - 1984

Order of Excellence - Delaware State Board of Education - 1989

Special Recognition - Establishment of First Annual Delaware Business Week - American Center for Enterprise Education

Memberships: List below all memberships and offices held in professional, fraternal, business, scholarly, civic, charitable, and other organizations for the last five years and any other prior memberships or offices you consider relevant.

Organization	Office held (if any)	Dates
Delaware State Chamber of Commerce	Chairman, Director	1973-1989
Delaware Humanities Council, Inc.	Chairman, Director	1978-1982, 1985-1988
American Gas Association	Chairman and Member Legal Section	1974-1986
Seamen's Center of Wilmington	President, Director	1988-1989
Delaware Trust Company	Director; Chairman, Audit Committee	1978-1989
American Center for Enterprise Education	Chairman, Director	c.1983-1989
State Bar of Texas		1960-Current

See Addendum

Employment record: List below all employment (except military service) since your twenty-first birthday, including the title or description of job, name of employer, location of work, and inclusive dates of employment.

1960	Law Clerk and Associate of Sam Sterrett, Esq., Robert Simmer, Esq., and Douglas Pollard, Esq., Houston, Texas
1961-1964	Associate - Bryan & Patton, Attorneys at Law, Houston, Texas
1964-1969	Attorney at Law, Self Employed, Houston, Texas
1967-1969	Counsel and Assistant Secretary, Triumph Industries, Inc., Houston, Texas

See Addendum

Military service: List below all military service (including reserve components and National Guard or Air National Guard), with inclusive dates of service, rank, permanent duty stations and units of assignment, titles, descriptions of assignments, and type of discharge.

Commissioned 2nd Lt. United States Air Force Reserve 17 July 1954

Honorably Discharged Captain 15 April 1965

See Addendum

PART I

MEMBERSHIPS - continued

Delaware State Bar Association	1974 - Current
Maritime Law Association of The U.S.	1962 - Current
Federal Bar Association	1969 - Current
National Council	1971
President, Delaware Chapter	c. 1978 - 1981
National Rifle Association	c. 1965 - Current
Delaware Rifle and Pistol Club	1974 - Current
Delaware State Pistol Club	1974 - Current
Delaware State Sportsmens Association	c. 1975 - Current
American Numismatic Association	1963 - Current
The American Legion	1988
The Army and Navy Club	c. 1973 - Current
Greenville Country Club	1973 - Current
The University and Whist Club of Wilmington	1973 - Current
United State Croquet Association	1985 - Current
Delaware Croquet Club	1985 - Current
American Bar Association	1960 - Current
District of Columbia Bar Association	c. 1971 - Current
Hugh O'Brien Leadership Foundation Delaware Advisory Board	c. 1984 - 1989
Delaware Solid Waste Authority Gubernatorial Appointment	1984 - 1985
Advisory Council on Volunteer Services Gubernatorial Appointment, Chairman	c. 1983 - 1989
American Academy of Political and Social Science	1980 - Current

PART I

EMPLOYMENT RECORD – continued

1969 – 1971	General Counsel, United States Services Administration, Washington, DC.
1971 – 1973	General Counsel, United States Department of the Navy, Washington, DC.
1973 – 1989	Vice President and Assistant General Counsel and General Counsel, Columbia Gas System Service Corporation, Wilmington, DE.
1989	Adjunct Professor of Law, Widener University School of Law, Wilmington, DE.

MILITARY SERVICE – continued

9/54 – 10/54	Student	3700th Preflight Training Group (Officer) Lackland A.F.B., TX
10/54 – 5/55	Student	3609th STURON (ATRC) Ellington A.F.B., TX
5/55 – 8/57	Base Motor Transportation Officer	3750th Trans Sq. (ATC) Sheppard A.F.B., TX
8/57 – 4/65	Last Reserve Assignment: Judge Advocate General's Area Representative	Air Reserve Records Center Denver, CO

Government experience:

List any advisory, consultative, honorary, or other part-time service or positions with Federal, State, or local governments other than those listed above.

Chairman, Advisory Council on Volunteer Services for State of Delaware

Member, Delaware Solid Waste Authority

Administrative Conference of The United States

City of Houston Charter Study Committee

Harris County (Texas) Mosquito Control District, Commissioner

General Counsel, Committee on Purchase of Blind Made Products

Published writings:

List the titles, publishers, and dates of books, articles, reports, or other published materials you have written.

Grandfather Rights Reexamined (copy attached)	South Texas Law Journal Vol. 5 No. 1 1960
Commentary on "Ethical Responsibilities of Engineers in Large Organizations: The Pinto Case" (copy attached)	Journal of Business and Professional Ethics Vol. 1 No. 1 1981
ADR can help business avoid costly litigation (copy attached)	Delaware State Chamber News 1985

Political affiliations and activities:

1. List all memberships and offices held in and financial contributions and services rendered to any political party or election committee during the last 10 years.

Republican National Committee Contributor

Republican Party of Delaware Contributor

Co-Chairman, Bush/Quayle '88 for Delaware

National Steering Committee, Fund for America's Future

Advisor to Drew Angeline, Candidate for Delaware State Senate

Contributor to several local candidates

Chairman, Columbia Gas Employees Political Action Fund

2. List all elective public offices for which you have been a candidate and the month and year of each election involved.

Texas House of Representatives, November, 1960

Future employment relationships:

1. Indicate whether you will sever all connections with your present employer, business firm, association, or organization if you are confirmed by the Senate.

That has been done.

2. State whether you have any plans after completing government service to resume employment, affiliation, or practice with your previous employer, business firm, association, or organization.

No

3. What commitments, if any, have been made to you for employment after you leave Federal service?

None

4. (If appointed for a term of specified duration) Do you intend to serve the full term for which you have been appointed?

Yes

5. (If appointed for an indefinite period) Do you intend to serve until the next Presidential election?

N/A

Potential conflicts of interest:

1. Describe any financial arrangements, deferred compensation agreements, or other continuing financial, business, or professional dealings which you have with business associates, clients, or customers who will be affected by policies which you will influence in the position to which you have been nominated.

None

2. List any investments, obligations, liabilities, or other financial relationships which constitute potential conflicts of interest with the position to which you have been nominated.

None to my knowledge.

3. Describe any business relationship, dealing, or financial transaction which you have had during the last five years, whether for yourself, on behalf of a client, or acting as an agent, that constitutes a potential conflict of interest with the position to which you have been nominated.

I know of none.

4. Describe any lobbying activity during the past 10 years in which you have engaged for the purpose of directly or indirectly influencing the passage, defeat, or modification of any Federal legislation or for the purpose of affecting the administration and execution of Federal law or policy.

I have testified on behalf of The Delaware Humanities Council, Inc. as its Chairman in connection with the budget of The National Endowment for the Humanities.

5. Explain how you will resolve any potential conflict of interest that may be disclosed by your responses to the above items. (Please provide a copy of any trust or other agreements involved.)

N/A

Testifying before the Congress

1. Do you agree to appear and testify before any duly constituted committee of the Congress upon the request of such committee?

Yes

2. Do you agree to provide such information as is requested by such a committee?

Yes

AFFIDAVIT

State of Delaware
County of New Castle) ss

, being duly sworn, hereby states that he/she has read and signed the foregoing Statement for Completion by Presidential Nominees and that the information provided therein is, to the best of his/her knowledge and belief, current, accurate, and complete.

Signature of Nominee

Subscribed and sworn before me this 19 day of Oct., 1989

Notary Public

GPO: 1980 91-077 (m)

GRANDFATHER RIGHTS RE-EXAMINED

HART T. MANKIN*

INTRODUCTION

It is entirely possible that Congress, in 1935, spawned what was to be a perpetuation of a pyramidal system of transportation. This observation naturally suggests itself due to the granting of the so-called "grandfather rights" (operating permits based simply upon existence at an arbitrary cut-off date) to motor carriers in existence at the time of the Federal Motor Carrier Act. It must be realized that as an industry transportation is second only to agriculture in size in the United States. It has been said that if the transportation in the United States came to a halt for one hour, it would take the country twenty years to recover. The problem of "perpetuation" still exists since "grandfather rights" themselves still exist and still retain, at least to some extent, some important remnants of their original vitality. This comment attempts to examine the background and current effect of "grandfather rights" which were granted nearly twenty-five years ago but still affect us today.

To understand the problems of the industry requires first, an understanding of the magnitude of the transportation industry; second, study of how the legislators and courts have met the problems of the industry; and third, an objective examination of the background of current problems in the industry.

A study of "grandfather rights" cuts across the fields of administrative law, economics, trade regulation and is, if not a chapter, a page in American business history. This re-examination attempts to utilize an approach which encompasses the three requisites of understanding outlined above. Because of the urgency of the problem in 1935 and its subsequent decrease in immediacy now, the opportunity for more objective study is possible. To go full circle, one of the changes noted in this paper should be made. The only purpose in even desiring that the problem go full circle would be to allow performance of an autopsy. As it is, the patient is very much alive and we as historical surgeons and scientists must be slow and deliberate.

The subsequently passed National Transportation Policy specified that all modes of transportation are to be used economically in the broadest sense of the word. The specific problem arises in the consideration of whether § 206 (a) (1)[1] and § 209 (a)(1)[2] (the former dealing with common carriers, the latter with contract carriers) of the Federal Motor Carrier Act of 1935,[3] hereinafter referred to as the Act, are in any degree inconsistent with the provisions of the National Transportation Policy.[4] At first blush there is an obvious incongruity. It is the opinion of this writer that there is an inconsistency but because of the loopholes, and the sometimes inequitable application of the Act, the inconsistencies, for the most part, can be treated as harmless.

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* B.A., University of the South, 1954; senior law student, College of Law, University of Houston.

[1] Except as otherwise provided in this section and in section 210a, no common carrier by motor vehicle subject to the provisions of this part shall engage in any interstate or foreign operation on any public highway, or within any reservation under the exclusive jurisdiction of the United States, unless there is in force with respect to such carrier a certificate of public convenience and necessity issued by the Commission authorizing such operations: Provided, however, That, subject to section 210, if any such carrier or predecessor in interest was in bona fide operation as a common carrier by motor vehicle on June 1, 1935, over the route or routes or within the territory for which application is made and has so operated since that time, or if engaged in furnish-

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ing seasonal service only, was in bona fide operation on June 1, 1935, during the season ordinarily covered by its operation and has so operated since that time, except in either instance as to interruptions of service over which the applicant or its predecessor in interest had no control, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission as provided in paragraph (b) of this section and within one hundred and twenty days after this section shall take effect, and if such carrier was registered on June 1, 1935, under any code of fair competition requiring registration, the fact of registration shall be evidence of bona fide operation to be considered in connection with the issuance of such certificate. Otherwise the application for such certificate shall be decided in accordance with the procedure provided for in section 207 (a) of this part and such certificate shall be issued or denied accordingly. Pending the determination of any such application the continuance of such operation shall be lawful: And provided further, That this paragraph shall not be so construed as to require any such carrier lawfully engaged in operation solely within any State to obtain from the Commission a certificate authorizing the transportation by such carrier of passengers or property in interstate or foreign commerce between places within such State if there be a board in such State having authority to grant or approve such certificates and if such carrier has obtained such certificate from such board. Such transportation shall, however, be otherwise subject to the jurisdiction of the Commission under this part. (49 U.S.C., § 306.)

[2] Except as otherwise provided in this section and in section 210a, no person shall engage in the business of a contract carrier by motor vehicle in interstate or foreign commerce on any public highway or within any reservation under the exclusive jurisdiction of the United States unless there is in force with respect to such carrier a permit issued by the Commission, authorizing such person to engage in such business: Provided, That, subject to section 210, if any such carrier or a predecessor in interest was in bona fide operation as a contract carrier by motor vehicle on July 1, 1935, over the route or routes or within the territory for which application is made and has so operated since that time, or, if engaged in furnishing seasonal service, only, was in bona fide operation on July 1, 1935, during the season ordinarily covered by its operations, except in either instance as to interruptions of service over which the applicant or its predecessor in interest had no control, the Commission shall issue such permit, without further proceedings, if application for such permit is made to the Commission as provided in paragraph (b) of this section and within one hundred and twenty days after this section shall take effect and if such carrier was registered on July 1, 1935, under any code of fair competition requiring registration, the fact of registration shall be evidence of bona fide operation to be considered in connection with the issuance of such permit. Otherwise the application for such permit shall be decided in accordance with the procedure provided for in paragraph (b) of this section and such permit shall be issued or denied accordingly. Pending determination of any such application the continuance of such operation shall be lawful. Any person, not included within the foregoing provisions of this paragraph, who or which is engaged in transportation as a contract carrier by motor vehicle when this section takes effect, may continue such operation for a period of one hundred and twenty days thereafter without a permit and, if application for such permit is made within such period, the carrier may, under such regulations as the Commission shall prescribe, continue such operation until otherwise ordered by the Commission: Provided further, That nothing in this part shall be construed to repeal, amend, or otherwise modify any Act or Acts relating to national parks and national monuments under the administrative jurisdiction of the Secretary of the Interior, or to withdraw such authority or control as may by law be held by the Secretary of the Interior with respect to the admission and operation of motor vehicles in any national park or national monument of the United States. (49 U.S.C., § 309.)

[3] 49 Stat. 543 (1935), 49 U.S.C. § 301 ff, and as amended.

[4] 54 Stat. 899 (1940), 49 U.S.C. preceding § 1, 301, 901, 1001.

MOTOR CARRIER ACT OF 1935

With the passage of the MOTOR CARRIER ACT OF 1935, Congress undertook, for the first time, positive direction over the physical expansion and detailed operating pattern of a rapidly expanding transportation business.[5] The Act, which is Part II of the Interstate Commerce Act, followed the Act to Regulate Commerce[6] by forty-eight years. The Act to Regulate Commerce was to become the Interstate Commerce Act by a provision in the Transportation Act of 1920.[7] The Panama Canal Act[8] broadened the powers of control of the Interstate Commerce Commission from strictly railroad regulation and later pipeline transportation in interstate commerce of commodities (except water and gas) to carriers by water. The significance lies, though, in the fact that there is such a relatively disproportionate time differential between Part I of the Interstate Commerce Act and Part II.

There is no comparable "grandfather" recognition as to rail carriers. The provisions of the Motor Carrier Act are in some degree effective but only so far as they are statutorily applicable. There are numerous exceptions to the coverage of the Act, so many in fact that considerable doubts have been raised regarding the validity and feasability of government regulation in this field. A close reading of § 203(b)[9] of the Act is necessary in order for attention to be properly oriented to the class of motor carriers under consideration. The many exceptions have given rise to criticism of the scope of the regulation of the Act. Certain of these exceptions, predominantly as to agricultural commodities, have continually been broadened as will be observed later.

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[5] National Transportation Policy, Charles L. Dearing, and Wilfred Owen, The Brooking's Institution, 1949, Washington, D. C., pp. 187-192.

[6] Approved February 4, 1887.

[7] Approved February 28, 1920.

[8] 37 Stat. 567 (1912), 15 U.S.C. § 31.

[9] Nothing in this part, except the provisions of section 204 relative to qualifications and maximum hours of service of employees and safety of operation or standards of equipment shall be construed to include (1) motor vehicles employed solely in transporting school children and teachers to or from school; or (2) taxi-cabs, or other motor vehicles performing a bona fide taxi-cab service, having a capacity of not more than six passengers and not operated on a regular route or between fixed termini; or (3) motor vehicles owned or operated by or on behalf of hotels and used exclusively for the transportation of hotel patrons between hotels and local railroad or other common carrier stations; or (4) motor vehicles operated, under authorization, regulation and control of the Secretary of the Interior, principally for the purpose of transporting persons in and about the national parks and national monuments; or (4a) motor vehicles controlled and operated by any farmer when used in the transportation of his agricultural (including horticultural) commodities and products thereof, or in the transportation of supplies to his farm; or (5) motor vehicles controlled and operated by a cooperative association as defined in the Agricultural Marketing Act, approved June 15, 1929, as amended, or by a federation of such cooperative associations, if such federation possesses no greater powers or purposes than cooperative associations so defined; or (6) motor vehicles used in carrying property consisting of ordinary livestock, fish (including shellfish), or agricultural (including horticultural) commodities (not including manufactured products thereof), if such motor vehicles are not used in carrying any other property, or passengers, for compensation; or (7) motor vehicles used exclusively in the distribution of newspapers; or (7a) the transportation of persons or property by motor vehicle when incidental to transportation by aircraft nor, unless and to the extent that the Commission shall from time to time find that such application is necessary to carry out the national transportation policy declared in this Act, shall the provisions of this part, except the provisions of section 204 relative to qualifications and maximum hours of service of employees and safety of operation or standards of equipment apply to: (8) The transportation of passengers or property in interstate or foreign commerce wholly within a municipality or between contiguous municipalities or within a zone adjacent to and commercially a part of any such municipality or municipalities, except when such transportation is under a common control,

Attention should be focused on common and contract carriers by motor vehicle except that broad excluded group above mentioned, to which immunity has been granted.

The Interstate Commerce Commission's affirmative control over the included carriers takes the form of grants of permission to the carriers to operate. The permission takes the form of a certificate of public convenience and necessity as to common carriers[10] and permits as to contract carriers.[11] Each of the sections of the Act providing for certificates and permits contains saving clauses or "grandfather rights."[12] The "grandfather rights" provisions provide for bona fide operation on critical dates.[13] Statutory requirements pertaining to the application for certificates or permits are thereby precluded. Through the granting or withholding of certificates and permits the government attempts to exercise positive control over the supply of transportation and the standards of competition.

According to Dearing and Owen[14] the control was applied too late to materially affect the development of the physical structure and operating pattern of the carriers. This might be too harsh a criticism, but if so, it is simply a matter of degree. Those carriers already occupying the field were permitted to continue operations without an affirmative showing of public need for their services.

The Supreme Court of the United States has generalized the effect of the "grandfather clause" provisions in holding that the purpose of the "grandfather clause" was to endeavor to preserve substantial parity between future operations and prior bona fide operations.[15] Congress recognized as "vested" such rights as had grown up before Congress acted;[16] but did not intend to freeze carrier

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management, or arrangement for a continuous carriage or shipment to or from a point without such municipality, municipalities, or zone, and provided that the motor carrier engaged in such transportation of passengers over regular or irregular route or routes in interstate commerce is also lawfully engaged in the intrastate transportation of passengers over the entire length of such interstate route or routes in accordance with the laws of each State having jurisdiction; or (9) the casual, occasional, or reciprocal transportation of passengers or property by motor vehicle in interstate or foreign commerce for compensation by any person not engaged in transportation by motor vehicle as a regular occupation or business, unless, in the case of transportation of passengers, such transportation is sold or offered for sale, or provided or procured or furnished or arranged for, by a broker, or by any other person who sells or offers for sale transportation furnished by a person lawfully engaged in the transportation of passengers by motor vehicle under a certificate or permit issued under this part or under a pending application for such a certificate or permit. (49 U.S.C., § 303.)

[10] See note 1 *supra*.

[11] See note 2 *supra*.

[12] § 206(a), § 209(a), see notes 1 and 2 *supra*.

[13] June 1, 1935, for common carriers; July 1, 1935, for contract carriers.

[14] See note 5 *supra*.

[15] United States v. Carolina Freight Carriers Corporation, 315 U.S. 475, 62 S.Ct. 722, 86 L.Ed. 971 (1942).

[16] Crescent Express Lines v. United States, 49 F. Supp. 92 (D.C.N.Y. 1943). *Aff'd.* 320 U.S. 401, 64 S.Ct. 167, 88 L.Ed. 127.

service in its exact status.[17] Though the courts have spoken of "vested" rights, it has been held that denial of a license under the "grandfather clause" provisions is not a violation of the Fifth Amendment to the Constitution of the United States since the individual carriers may still apply for a permit or certificate under the regular provisions of the Act.[18] Thus, it is evident that these "rights" are not "rights" as are understood by students of constitutional law. If they had been such "rights," then, to follow theory, a constitutional amendment would have been necessary. Of course, these "rights" about which we are speaking, are "rights" of a lesser degree of sanctity than those rights guaranteed by the Constitution.

From a case by case approach to the application of the "grandfather clause" provisions, eight elements of rights can be determined (most of these elements are also applicable to the permit and certificate proceedings):

1. Bona fides.
2. Regularity and extent of operations.
3. Equipment and use.
4. Whether owned or leased.
5. Control or lack thereof over operators and equipment.
6. Relationship between applicant and operator.
7. Lawfulness of operations in different states.
8. Applicant's responsibility to shipper and public.

The first requirement of "bona fides," being the only one specifically mentioned in the § (206(a)[19] and § 209(a))[20] of the Act, has had the most comprehensive interpretation. Mere ability to furnish the transportation is not enough; the carrier must have furnished actual rather than potential service. The service furnished must be substantial rather than incidental.[21] Compliance with state regulatory requirements, while not decisive in itself, is a factor to be relevant to the establishment of the absence of "bona fide" operation by a carrier seeking a certificate of public convenience and necessity.[22]

The question as to regularity and extent of operation has been more broadly interpreted. While ordinary operations must be actual (rather than potential or a mere holding out, or ability or willingness to serve), substantial, continuous and regular, the Interstate Commerce Commission in its discretion has made allowance for sporadic transportation and willingness to serve a particular area.[23]

As a general rule, in order to obtain a "grandfather" certificate the applicant must have continued to perform adequate service up to the time of the Commission's grant of authority. But if the discontinuance of operations is due to conditions over which the applicant has no control, the certificate may still be granted. Excellent examples of the thinking in this area can be found in *Gregg Cartage Co. v. United States*[24] considering bankruptcy as not being within the control of the applicant and *Herrin Transportation Co. Inc. v. United States*[25] in which abandonment precluded certification.

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[17] Byers Transportation Co. v. United States, 49 F. Supp. 828 (D.C.Mo. 1943).

[18] Transamerican Freight Lines v. United States, 51 F. Supp. 405 (D.C.Del. 1943).

[19] See note 1 *supra*.

[20] See note 2 *supra*.

[21] McDonald v. Thompson, 305 U.S. 263, 59 S.Ct. 176, 83 L.Ed. 164 (1938), rehearing denied 305 U.S. 676, 59 S.Ct. 356, 83 L.Ed. 437.

[22] Alton R. Co. v. United States, 315 U.S. 15, 62 S.Ct. 432, 86 L.Ed. 586 (1942).

[23] See United States v. Carolina Freight Carriers cited in note 15 *supra* and Alton R. Co. v. United States cited in note 22 *supra*.

Though equipment and use has been mentioned as one of the relevant considerations, no test firm enough for use as a guide has been set out. In other words, no firm criterion has been determined which is sufficiently self-sustaining to provide a clear and concise test of relevancy as to this element.

The problem of whether the equipment is owned or leased has given rise to a great deal of discussion. Up to 1940 the term common motor carrier was defined in § 203(a)(14):[26]

> . . . any person who or which undertakes, whether directly or by lease or by any other arrangement, to transport passengers or property . . .

The Transportation Act of 1940 changed the terminology to:

> . . . any person which holds itself out to the general public to engage in the transportation by motor vehicle in interstate or foreign commerce of passengers or of property . . .

Construing § 203(a)(14)[27] and § 206(a)(1)[28] together, apparently the "grandfather" applicant must be the one who controls the transportation transaction by having satisfactory insurance in force, solicits shipments, issues bills of lading, establishes and collects the freight charges, and in general is responsible to the shipping public. A transportation company need not own its vehicles to be a "carrier" within the terms of the "grandfather clause" since the clause does not require any certain type of ownership.[29] The ownership criterion gives rise to another consideration. Is the test one of practical control or is a legal test of control used? By legal test of control is meant the paying of rent on leased equipment and other like business relationships independent of practical control giving vitality to a legal relationship. More than theoretical control is required because there are practical implications arising therefrom.

Control or lack thereof over operators and equipment and the relationship between applicant and operator will be treated together. In *United States v. Rosenblum Truck Lines Inc.*[30] a truck owner-operator who leased his equipment to an authorized common or contract carrier to haul that carrier's overflow freight and did not serve the public directly on the crucial dates for the

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[24] 316 U.S. 74, 62 S.Ct. 932, 86 L.Ed. 1283 (1942).

[25] 344 U.S. 925, 73 S.Ct. 497, 97 L.Ed. 714 (1953).

[26] 49 U.S.C. § 303 (a)(14).

[27] *Id.*

[28] See note 1 *supra*.

[29] Calvin v. United States, 44 F. Supp. 684 (D.C.Mo. 1942).

[30] 315 U.S. 50, 62 S.Ct. 445, 82 L.Ed. 671 (1942). Noted in 41 Mich. L. Rev. 162 (1942).

determination of "grandfather rights" was determined not to be entitled to such grant of rights. Another area which will be considered later is emphasized by *Thomson v. United States*[31] wherein an independent motor contractor providing facilities for a railroad's transportation system is not entitled to a "grandfather" certificate in its own right, because his was only a part or segment of the railroad's general transportation facilities. The use of the term "independent contractor" instead of "agent" was deemed to be immaterial.

In considering lawfulness of operations in different states, *Alton Railroad Co. v. United States, supra,*[32] has enunciated the rule which with unusual consistency, has been followed.

The applicant for a certificate under the "grandfather" provision of the Act must have direction and control of the motor vehicles so that it would be responsible both to the shipper and to the general public for their operation. The key lay in the oft-quoted statement: *Mere user, though exclusive, is not enough.*

Taking all these elements into consideration, cases have been consistently tending towards strictly construed requirements.

THE NATIONAL TRANSPORTATION POLICY

The National Transportation Policy[33] as declared, states as its aim:

> To provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions—all to the end of developing, co-ordinating, and preserving a national transportation system by water, highway, and rail as well as other means adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense.

As a starting point of consideration, notice must be taken of a decision of general propriety. It was held in *Capital Transit Co. v. United States*[34] that § 206[35] does not override the specific requirement of the National Transportation Policy that the inherent advantages of all modes of transportation be retained. The Interstate Commerce Commission has the exclusive responsibility under the National Transportation Policy to foster sound economic conditions in transportation and among carriers in order to preserve a national transportation system adequate to meet the needs of commerce and national defense.[36]

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[31] 321 U.S. 19, 64 S.Ct. 392, 88 L.Ed. 513 (1944).

[32] See note 22 *supra.*

[33] See note 4 *supra.*

[34] 97 F. Supp. 614 (D.C.D.C. 1951).

[35] See note 1 *supra.*

The National Transportation Policy is considered to be amendatory of the Act rather than merely supplementary. The theory of the National Transportation Policy is self evident; its practicalities are the consideration of this exposition.

The responsibility for the application of the terms of the National Transportation Policy rests in the Interstate Commerce Commission. How much more lucidly could the Commission have stated its position than when it said, "All provisions of the Act are to be administered and enforced with a view to carrying out the declaration of the National Transportation Policy"?[37] Consideration under the Policy basically would simply require a balancing of the utilities and an ultimate decision based on an equitable determination of relative rights. Such is not possible however because of many different problems such as unwillingness to serve an area or territory, inherent qualities of commodities requiring special facilities, inherently different operational problems in the various modes of transportation—and last, but certainly not least, a recognition of previously "vested" rights, i.e., "grandfather rights".

THE CONFLICT

Thus the problem under consideration here is whether there is a practical conflict of philosophies between § 206(a)(1)[38] of the Interstate Commerce Act and the declaration of policy in the National Transportation Policy.[39]

The "grandfather" clause of the Act provides that a carrier or its predecessor in interest, "in a bona fide operation" as a common carrier by motor vehicle on June 1, 1935, or as a contract carrier on July 1, 1935, "over the route or routes or within the territory for which the application is made" and which has so operated since that time except "as to interruptions of service over which the applicant or its predecessor in interest had no control", shall be entitled *as of right* to a certificate or permit (emphasis supplied). No showing need be made as to "public convenience or necessity" or that the proposed operation will be "consistent with the public interest and the National Transportation Policy".[40] Two of the chief problems showing a conflict between the "grandfather clause" and the Act are couched in these terms:

> (1) Does the "grandfather clause" recognize multiple rights to certificates or permits based on a single integrated transportation service, or on dual operations by one or more carriers on and after the statutory dates?

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[36] Utah Poultry and Farmer's Co-op v. United States, 119 F. Supp. 846 (D.C. Utah 1954). Reversed by Secretary of Agriculture v. United States, 350 U.S. 162, 76 S.Ct. 244, 100 L.Ed. 173 on another point.

[37] Citrus Fruits From Florida to North Atlantic Ports, 266 I.C.C. 627 (1946).

[38] See note 1, *supra*.

[39] Cited herein.

[40] XXVIII Cornell Law Quarterly No. 3, March 1943.

> (2) What limitations may the Interstate Commerce Commission properly impose upon the scope of authorization in the certificate or permit as to routes or territory covered, classes of commodities carried or classes of shippers served?

Considering the multiple-rights facet, the Act expressly provides against the grant of both a common carrier certificate and a contract carrier permit to the same carrier "for the transportation of property by motor vehicle over the same route or within the same territory unless for good cause shown the Commission shall find that such certificate and permit may be held consistently with the public interest and with the policy declared" in the Act.[41] Pending the Commission's determination of the applications the carrier may operate both as a common carrier and a contract carrier.[42] The prohibition was extended by the Transportation Act of 1940[43] to cover dual operations by affiliated motor carriers. This was upheld in *Ziffrin, Inc. v. United States.*[44] Dual operations by unaffiliated carriers where there was intercontrol arising otherwise than by the scheme of business organization, as for example, by contract or lease, was also covered. The problem of multiple rights under the "grandfather clause" where two or more unaffiliated carriers were co-operating in rendering an integrated service on the statutory dates has caused more serious concern. As seen in the case of *United States v. N. E. Rosenblum Lines, Inc.*[45] an applicant merely by virtue of hauling another carrier's overflow freight was not entitled to a certificate or permit in its own right under the "grandfather clause".

Congress did not intend to grant multiple "grandfather rights" on the basis of a single transportation service, and, since presumably the employing common carriers were entitled to common carrier "grandfather rights" over the entire line "automatically to grant contract carrier rights to such operators as appellants who performed part of that service under agreement might result in such a wholesale distribution of permits as would defeat the very purpose of federal regulation".[46]

> "The result would be to create in this case two services offering transportation to the public when there had been only one of the 'grandfather' date without allowing the Commission to determine if the additional service was in the public interest."[47]

Since multiple rights are denied, only one of the carriers involved in integrated service may qualify under the "grandfather" provision and that one must be the one "who offered the complete transportation service to the general public and the shipper".[48]

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[41] § 210, 49 U.S.C. § 310 (1940).

[42] Thomas v. National Delivery Ass'n., Inc., 24 F. Supp. 171 (D.C.W.D.Pa. 1937).

[43] 54 Stat. 919, 923.

[44] 318 U.S. 73, 63 S.Ct. 465, 87 L.Ed. 621 (1943) arising out of Ziffrin, Inc. 28 M.C.C. 683 (1941).

[45] See note 30 *supra.*

[46] *Id.*

[47] *Id.*

[48] *Id.*

As to the second question of the Commission's limiting of the granted certificate or permit, Congress recognized the need to maintain a "substantial parity between future operations and prior bona fide operations"[49] but sought to preempt abuse by speculators so the Act required the Commission to restrict the scope of service authorized in the certificate[50] or permit.[51] The Commission must place geographical restrictions upon the routes or territory to be covered, and economic limitations on the classes of commodities to be carried and the classes of shippers to be served.[52] Perhaps Dearing and Owens' criticism could better be lodged here.[53]

While "grandfather rights" were apparently strictly construed, and while there was a relatively short time period during which such rights had to be established, the point today cannot be considered completely moot.

Applications for Operating Rights Filed by Motor Carriers
with I. C. C. to October 1, 1937[54]

"Grandfather" applications filed on and prior to February 12, 1936 . .	82,770
"Grandfather" applications filed after February 12, 1936	6,781
TOTAL applications (all types)	155,216

With transfer and sale of operating rights, a consideration of the perpetuation of a system of questionable efficiency based solely on length and dates of service in the face of the stated policy determination is in order. The only current repercussions of the "grandfather rights" remain in the transfer of such operating rights. The motor transport industry is made up primarily of small businesses. The latest authoritative figures are now ten years old but serve to at least show the general scheme of things.

Twenty-six per cent of the carriers engaged in interstate commerce have only one truck, ninety-two per cent operate less than ten trucks.[55] Thus, efficiency becomes a prime consideration. Mr. Justice Jackson's dissent in *United States v. Carolina Freight Carriers Corporation*[56] was concerned with the specific point:

> When a carrier claims "grandfather rights" to service the entire Atlantic seaboard as a general common carrier, with equipment consisting on the critical dates of eight trucks the Commission is obviously forewarned that it must guard against granting franchise privileges that will result in their having a speculative value to the carrier rather than a service value to the public.

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[49] See note 22 *supra*.

[50] § 208 (a), 49 U.S.C. § 308 (a) (1940).

[51] § 209 (b), 49 U.S.C. § 309 (b) (1940).

[52] But see Pacific Motor Trucking Co., 34 M.C.C. 249 (1942).

[53] See note 14 *supra*.

[54] 61st annual report of Interstate Commerce Commission, 1947, p. 114.

[55] Hearing before Sub-committee of House Small Business Committee, House of Representatives, 81st Cong., 1st Sess., June 10, 1948.

[56] See note 15 *supra*.

RESUME

Even if it is thought that a consideration of the problems before us is moot, one extremely valuable result makes itself felt in administrative history. The "grandfather" provisions in the FEDERAL MOTOR CARRIER ACT[57] served as a guide to subsequent "grandfather" provisions in federal acts. The clearest example of this is the heavy reliance placed by the Congress in the CIVIL AERONAUTICS ACT OF 1938[58] on the precedent and consideration of the "grandfather" provisions in the Motor Carrier Act.

Though comparatively infrequent in recent years the problem of "grandfather rights" still concerns the courts as is shown in the annual report of the Interstate Commerce Commission of 1958:[59]

> The Supreme Court affirmed the decision of a district court which had upheld a cease and desist order in an investigation proceeding, in which we had found, contrary to the contention of the carrier, that the phrase contained in its "grandfather" permit "stock in trade of drugstores" authorized the transportation of only commodities which were consigned to a drug store or were intended for ultimate delivery to a drug store. The carrier contended that we had misinterpreted its permit, and by our order had imposed restrictions upon it which did not exist. The Supreme Court said that if the permit does not correctly reflect the scope of the "grandfather" operation the carrier's recourse is to petition us to reopen the "grandfather" proceedings for consideration of the evidence not previously brought to our attention.
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> *Andrew G. Nelson, Inc. v. United States et al., 355 U.S. 554, 78 S.Ct. 496, 2 L.Ed. 2d 484, rehearing denied 356 U.S. 934, 78 S.Ct. 770, 2 L.Ed. 2d 763, opinion below 150 F.Supp. 181. (Andrew G. Nelson, Inc.—Investigation of Operations, Docket MC—C—1610, 63 M.C.C. 407)*

Attention is called to the briefs of counsel for appellees for an enlightened view on limited construction of "grandfather rights" provisions.[60]

A long awaited revision of policy came forth in 1953. Probably no one expected any drastic changes, and no one was thereby disappointed after having studied it. Senator Smathers (D. Fla.) introduced Senate Resolution 303 which was referred to the Committee on Interstate and Foreign Commerce and adopted by the Senate on June 23, 1958:

> Whereas a sound national transportation system is essential to the continued economic development and defense of the United States and
>
> Whereas fair and equitable Federal policies are necessary to assure such a sound national transportation system; and

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[57] See notes 1 and 2 *supra*.

[58] Act June 23, 1938, c. 601, 52 Stat. 977.

[59] 72d Annual Report, I.C.C., p. 126, GPO, 1958, 86th Cong., 1st Sess., House Document No. 12.

[60] 2 L.Ed. 2d 1798.

Whereas hearings held by the Surface Transportation Subcommittee of the Committee on Interstate and Foreign Commerce have disclosed there is urgent need for a comprehensive study of such transportation policy, and related problems by the Congress, to the end that sound policies may be evolved: Now, therefor, be it

Resolved, That the Committee on Interstate and Foreign Commerce, or any duly authorized subcommittee thereof, is authorized under § 134(a) and § 136 of the Legislative Reorganization Act of 1946, as amended, and in accordance with its jurisdiction specified by rule XXV of the Standing Rules of the Senate, to examine, investigate, and make a complete study of any and all matters pertaining to—

1. The need for regulation of transportation under present day conditions and, if there is a need for regulation, the type and character of that regulation.
2. The area of Federal policy dealing with government assistance provided the various forms of transportation and the desirability of a system of user charges to be assessed against those using such facilities.
3. The subject of the ownership of one form of transportation by another.
4. Federal policy on the subject of consolidations and mergers in the transportation industry.
5. Policy considerations for the kind and amount of railroad passenger service necessary to serve the public and provide for national defense.
6. The relation between Federal regulation (. . . and exemption therefrom . . .) and Federal promotional policy in regard to the various forms of transportation.

(Subsequent sections deal with expenditures toward the study. January 31 was the cut-off date for the report.)

This resolution of January 20, 1959, was re-introduced by Senators Magnuson (D. Wash.) and Smathers as Senate Resolution 29 which extended the cut-off date to January 31, 1960.

The Senate and House Interstate and Foreign Commerce Committees, after five months of hearings, came up with Senate Bill 3778, Transportation Act of 1958, approved by the President on August 12, 1958 as public law 85-625.[61] The provisions of the bill include the guarantee of loans made to railroads on behalf of the government by the Interstate Commerce Commission; a clarification of the Interstate Commerce Commission's jurisdiction over intrastate rates; a conferring on the Interstate Commerce Commission of jurisdiction over the discontinuance or change in certain passenger train operations or services; an amendment of the rule of rate making; a restriction of further judicial expansion of the agricultural commodity exceptions; a more effective means of coping with the problem of pseudo-private carriage by motor vehicle by writing into the statute the primary business test applied in the Lenoir Chair case (*Brooks Transportation Co. v. United States*).[62]

After examining the background of the "grandfather rights" provisions three controversial questions become evident:

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[61] 72 Stat. 568.

[62] 340 U.S. 925, 71 S.Ct. 501, 95 L.Ed. 668.

1. Is a re-examination of the "grandfather rights" in order in the light of today's conditions?
2. Should there be a time limit set on the transferability of operating rights granted under the "grandfather rights" provision of the Federal Motor Carrier Act?
3. Should transferees of "grandfather rights" operating rights be required to justify their use of the rights on the basis of necessity, etc.?

The first of these problems has been sufficiently discussed. One needs only to look to the perpetuation of inefficiency in the guise of a retention of parity. Is this always the best way? Just what "rights" does one have to maintain a business which is so necessary to the national defense and economic stability without continually justifying its necessity and importance? A re-examination law would have a disastrous effect on the political future of our federal legislators if it can be said that the motor carrier industry has any sufficient degree of influence at all. That the industry does bear some political weight is obvious in the current dispute between one Southwestern truck line and the Teamsters Union. The transportation industry, by sheer weight and magnitude, must necessarily influence the labor unions and the power of the combination is extremely dramatic to say the very least. Its potential at this time is untapped but only because of its relatively disorganized feature when compared to its power potential.

Political expediency precludes a re-examination of the necessity and efficiency of a vested business interest in the majority of cases. Further, a great number of existing franchises have pyramided from the original "grandfather" grant. Just how many currently exist that are progeny of the "grandfather" grants is difficult to determine with any great degree of certainty. The problem exists, nevertheless. This solution must be balanced with its political ramifications, however, before the federal government can go as far as a re-examination would require. It is infinitely more difficult to take away or even question that which has been given prior.

In the same general area, the second solution suggests itself, that of setting a time limit on the transferability of operating rights granted under the "grandfather" provision. This concept necessarily cannot stand alone but requires subsequent opportunity for the carriers involved to re-justify their existence. This solution would necessarily be an easier one to accept since it would not effect the initial recognition of that which the courts have called a "vested right". The further effect of this method would be to keep the carriers from becoming stagnant, at least if ultimate transfer was possible. The wide loophole of ineffectiveness of this concept is obvious; to meet it, a time limit could be set on the transferability of rights under the "grandfather" provision. For example, a fifty year maximum period could be written into an act after which no "grandfather" operating rights may be transferred but not detracting any from the original grantee's authority to operate under the original grant. It is naive to suppose that what has been economically and socially efficient in the past is necessarily and economically and socially efficient now.

The next logical step in a continuation of this line of reasoning would be to require re-justification by subsequent grantees of the grant as to convenience and necessity in their own right. This then, would provide for changing economic and physical conditions. This method comes closest to tying operating rights to existing conditions thereby approaching an apex of theoretical and practical efficiency. This again would not effect the "vested rights" of the original grantee. It would, however, preclude "coat-tail riding" by subsequent grantees.

Though this would apparently involve a reversal of the philosophy surrounding the recognition of the "grandfather rights", such would not, in fact, be the case when the mandate of the National Transportation Policy is considered. It may well be said at this point that a change in philosophies is necessary. Such is not the case, however, if attention is directed to the original grantee's position. So long as the original grantee's position is not affected, perhaps subsequent grantees' positions should not be as closely protected as they are under the current philosophies. Now, there is practically no difference between the position of the original grantee and subsequent grantees. The controlling question is, of course, whether the position of subsequent grantees should be as strongly protected as that of the original grantee.

How many of these "grandfather rights" now are perpetuated and their relationship to the number of carriers ceasing operations annually remains a matter of speculation, no assistance being available relative to specific figures. It would be interesting to compare the percentage figures of carriers ceasing operations whose rights emanated from the "grandfather" provisions with those whose operating rights did not. This might at least be evidence of any impracticality or inefficiency in the system as originally instituted.

Commentary on "Ethical Responsibilities of Engineers in Large Organizations: The Pinto Case"

Hart T. Mankin

Dr. De George is entirely too easy on engineers or, for that matter, anyone else who faces a moral dilemma. He would seem to say that there is no further obligation to do something about a moral problem on the part of the individual if his personal risks are greater than the chance of success in affecting a change. I was stunned to read "...we cannot reasonably expect engineers to be willing to sacrifice their jobs each day for principle...". I thought that was what principles were about. If we talk about moral principles, we are removed from the lesser ethical requirements of the engineers' code. Surely if an engineer perceives his dilemma to be one of moral principle, can he do any less than sacrifice his job? (So that obeisance is paid to pragmatism, I hasten to acknowledge that engineering jobs today are fairly easy to obtain.) I must inquire, however, why anyone would want to continue working at a job where his moral principles are violated. Surely one may disagree with one's supervisor's ignoring his suggestions without it necessarily calling moral issues into play. It could be said that the moral question was answered when the engineer took a job with a weapons manufacturer, an automobile manufacturer, or a bathtub manufacturer (after all, think of the number of deaths and injuries which involve bathtubs).

Dr. De George uses the Pinto case as a vehicle, but he either knowingly or unknowingly involves two other ethical areas--the ethics of journalism and the ethics involved in the Rules of Evidence in the law. Because his use of the Pinto case is not determinative of his conclusions, it shall not be necessary to comment on the quality of the information upon which he relied.

Legal writers are also using the Pinto case in the area of business ethics and the ethics of the corporation--how far can personification of the corporation go?

The corporation's personality and its ethical role in the community is probably determined in large measure by its historical reputation and the quality of its press. It is undoubtedly correct, as Dr. De George stated, that "unless those at the top set a moral tone, unless they insist on moral conduct, unless they punish immoral conduct and reward moral conduct, the corporation will function without considering morality of questions and of corporate actions."

Copyright Hart T. Mankin

In fact, there is a corporate morality and it is generally set by the Chief Executive Officer and/or the Board of Directors either consciously or subconsciously and is usually considered to be very important. Generally speaking, that attitude does tend to filter down except in those isolated instances where the lower-ranking, result oriented employee thinks that it would be in the corporation's best interest to cut corners. The corner cutting can be deliberate to save costs, or from ignorance, or be presumed to be consistent with the ethics of the marketplace. All three of these considerations are obviously grossly in error and certainly will result in harm done to the corporation. Of course, there are examples of senior management countenancing such conduct, but those are unusual.

Getting back to the Pinto case which Dr. De George uses as a dramatic example, let's examine it a little more closely.

Our exploration must necessarily be based on Dr. De George's description which, in turn, is based on newspaper and magazine accounts which may or may not be accurate. Assuming accuracy, would it not be fair to say that no product can be made 100% safe? Safety standards set by the National Transportation Safety Board with the assistance of other professional and trade organizations, together with standards set by such nongovernmental groups, reflect the state of the engineering art at the time the standards are set and provide for standards that will reflect the intended usage of the product with a small additional margin of safety. The additional margin of safety must necessarily be a subjectively established figure which takes into consideration the design of a product when considering its marketability; that is to say, its desirability by the public for whose intended use it was manufactured. One considers its engineering together with its styling, its price and its probable market. In the case of the Pinto, a subcompact automobile, I suspect that any number of $6.65 and $11 improvements could be made to it to have made it substantially safer than it was. That additional margin of safety would probably have provided for occurrences far beyond its intended use. It is obvious that it could have been made virtually as safe as an armored car with its higher margin of safety, but it probably would not have sold. It sold because the market was there.

It seems to me that the Pinto case best makes the case for a consideration of the study of corporate or organizational ethics rather than to be used as a vehicle for examining the moral or ethical obligations of an engineer. The problem is indeed of a different dimension when the debate is about professional rules generated to reflect society's expectations of engineers and the standards the profession sets for itself. Exploring the ethics of the engineer requires an examination of those engineering standards and codes which are established and which the engineer presumably follows as the standards of his profession. The ethical responsibility of an engineer who believes that the state of the art has surpassed the standards set in a particular engineering discipline does indeed have a significant ethical engineering problem to face. Whether or not it achieves the level of a moral dilemma depends in large measure on the individual engineer's perception. A nice question to be addressed could be simply posed as what service does an engineer provide? Is it one coupled with an ethical overlay beyond simply designing or manufacturing a product to the then current state of the art? In my judgment, even an affirmative answer to a majority of the situations that could arise under such a circumstance would not require or even suggest whistle-blowing. Clearly the engineer should provide his highest degree of expertise to client-employer. His contribution is one of many made to his employer. Beyond his field, he may be entering areas in which he has no particular qualifications. He is a contributor to an ultimate product and short of extraordinary circumstances would be expected to provide his best engineering knowledge. When a manufacturer is designing a subcompact automobile to compete in the subcompact automobile market, he does not do those things that he would do if he were competing in the luxury sedan market. Engineering ethics would presumably view "over-engineering" or "over-design" with almost as much disdain as cutting corners.

Dr. De George concludes his well reasoned paper with the argument that the questions that we should be facing concern how to change organizational structures so that engineers will not have to be placed in moral dilemmas. It seems to me that the sensitizing of professionals to ethical considerations should be increased so that organizational or institutional structures will reflect enhanced ethical sensitivities as trained professionals move up the organizational ladder to positions of leadership. Organizations may reflect ethics by consensus. The consensus is from individuals, their education, their training, their perceptions and their reactions to external forces. In conclusion, I would suggest that the engineer faces no different moral dilemmas than any other human being. His difficulty comes in determining his response to ethical considerations if those considerations are based on transitory standards of his profession. As an example, if an electrical engineer is ethically bound to design to the standards of the National Electrical Code and does not, he faces a rather simple problem. If, on the other hand, as is suggested in the paper by Dr. De George, he may believe that the Code standards are not strict enough and he insists upon designing to higher standards than the Code provides, he is faced with an entirely different dimension of problem, both philosophical and legal.

Weep not for the engineer who may, on rare occasion, be squeezed because of his ethics. Contemplate instead the responsibilities that we have to assure that all institutions, including business, be operated on an ethical and perhaps moral level.

[From the State Chamber News, November 1985]

ADR can help business avoid costly litigation

By Hunt T. Mankin, Esq.
Vice President and General Counsel
Columbia Gas System
Service Corporation

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Does the thought of going to court terrify you? Would high legal fees, high costs of litigation, a lot of time away from your office and the aggravation of having to sue a supplier or customer be more than your business could stand?

Unless you are a lawyer, the answer to those questions is a definite "Yes". More and more businesses are seeking alternatives to lawsuits to settle their commercial disputes. Interestingly, judges are supporting alternatives to litigation.

There are times when men of good faith have differences. There was a time when the only alternative to suing was taking the loss and forgetting about it. When you wish to continue doing business with a supplier even though you have a legitimate dispute over a matter, your alternatives are no longer limited.

A new area of law has emerged called Alternate Dispute Resolution—ADR. A common example of ADR is arbitration, which can be as formal as that done under the rules of the American Arbitration Association or the International Chamber of Commerce or as informal as agreeing to submit your dispute to a disinterested third party on whom you can agree.

A newer alternative to a court trial is a mini-trial. A mini-trial is a procedure where decision makers on each side and their lawyers, together with an agreed upon third party who may or may not be a judge, present their cases within certain time restrictions and negotiate a businesslike resolution of their dispute. Thus a legal problem is attempted to be turned into a business problem.

Another fascinating development in this area is called "rent a judge", in which the parties agree to have their dispute resolved by a judge, either active or retired, and abide by his decision. Mediation as used in certain disputes is another form of ADR.

There are variations on all of these methods, all seeking the same thing—avoiding the disruption to your business that the traditional lawsuit entails. There are a number of companies set up that can provide judges, arbitrators, etc. to handle the ADR for your company, or you may be able to do it on your own.

The next time you have a legitimate dispute, ask your lawyer whether ADR is a realistic alternative to going into court. More and more lawyers are becoming aware of ADR and in Delaware, the Delaware Law School offers a seminar in Alternate Dispute Resolution taught by retired Chief Justice Daniel L. Herrmann of the Delaware Supreme Court. Businessmen, judges and lawyers are all seeking ways to assure that rights are protected in the least costly and time-consuming way possible.

Can ADR help the problem of businesses inability to buy liability insurance at a reasonable price, or for that matter, any price?

Whether or not you believe that the current high premiums for liability insurance are an aberration and will come back down, ADR can contribute to solving the problem. Insurance companies' experience in litigation costs are exceeding their worst nightmares. Bhopal and Dalcon Shields may be foreign to your business, but the experience that insurance companies have had involving those matters will spread over all businesses—large and small.

When you realize that insurance companies simply manage the money that society spends to protect itself from unanticipated loss, there have to be limits. These limits are being exceeded every day in courts with judgments, high attorney's fees and extraordinarily high costs for something called "pretrial discovery".

Pretrial discovery is the attorney's answer to the physician's requiring more tests, insisting that all the facts need to be determined in a case. That is expensive.

What can ADR do? ADR can cut down on the amount of litigation in the courthouse with all of its attendant expenses. Along with high verdicts, which can be limited by the amount of insurance purchased, attorney's fees are normally paid by the insurance company and those are frequently not limited. It will be a matter of time before insurance companies will place limits not only for amounts of liability ruled by the courts but will place limits on the amount of attorney's fees that they will pay for their insureds. The business community can put the brakes on escalating costs by using lower cost alternatives. ADR can be a very real benefit there.

ADDITIONAL QUESTIONS FOR NOMINEES TO THE UNITED STATES COURT OF VETERANS APPEALS
(To Be Made Public)

Bar associations: List all bar associations and legal or judicial-related committees or conferences of which you are or have been a member and give the titles and dates of any offices which you have held in such groups.

State Bar of Texas

Delaware State Bar Association

Maritime Law Association of The United States

American Bar Association

Federal Bar Association, National Council, 1971 President DE Chapter c.1978-1981

Houston Bar Association

District of Columbia Bar Association

Court admissions: List all courts in which you have been admitted to practice, with dates of admission and lapses if any such memberships lapsed. Explain the reason for any lapse of membership. Give the same information for administrative bodies which require special admission to practice.

United States Supreme Court	1968
Supreme Court of Texas	1960
United States Court of Appeals for the District of Columbia Circuit	1976
United States Court of Appeals for the Fifth Circuit	1962/1981
United States Court of Appeals for the Eleventh Circuit	1981
United States District Court for the Southern District of Texas	1960
United States Court of Claims	**1969**
District of Columbia Court of Appeals	**1971**
Interstate Commerce Commission	**1960**
United States District Court for the District of Columbia	**1971**

Judicial office: State (chronologically) any judicial offices you have held and whether you were elected or appointed to them and provide a description of the jurisdiction of each such court.

None

Judicial opinions: If you are or have been a judge, attach a statement providing (a) citations for the ten most significant opinions you have written, (b) a short summary of and citations for all appellate opinions either reversing your decision or confirming it with significant criticism of your substantive or procedural rulings, and (c) citations for significant opinions on federal or state constitutional issues, together with citations for any appellate court rulings on your decisions in those cases. (If any of the opinions listed were not officially reported, please provide copies of the opinions.)

Speeches: Attach copies of all speeches you have given on issues involving constitutional law, legal policy, or matters relating to veterans' benefits. If there were press reports of any such speeches and they are readily available to you, please provide them.

I have made no speeches on issues involving constitutional law, legal policy, or matters relating to veterans benefits. I have made speeches on various aspects of government contracting, economic development in the State of Delaware, business ethics, and corporate social responsibility. I do not maintain a speech file nor maintain press reports of speeches.

Legal career:

1. Attach a chronological description of your law practice and experience after graduation from law school, including (a) whether you served as clerk to a judge, and if so, the name of the judge, the court, and the dates of the period you were a clerk, (b) whether you practiced alone, and if so, the addresses and dates, and (c) the dates, names, and addresses of law firms or offices, companies, or governmental agencies with which you have been connected, and the nature of your connection with each.

2. Describe the general character of your law practice, dividing it into periods with dates if its character has changed over the years.

See Attachment

3. Describe your typical former clients and the areas, if any, in which you have specialized.

See Attachment

4. State whether you have appeared in court frequently, occasionally, or not at all. If the frequency of your appearances in court has varied over time, describe each such variance, giving dates.

While I was with Bryan & Patton I was in court frequently (1962-1964). During the time I was in private practice (1964-1969) and at Triumph Industries (1967-1969) I was in court occasionally. Since becoming General Counsel both in the public and private sectors I have rarely appeared in court since the bulk of my litigation responsibility was developing strategy, reviewing pleadings, and approving strategies.

5. State the number of cases in courts of record you tried to verdict or judgment (rather than settled), indicating whether you were sole counsel, chief counsel, or associate counsel, and identify the courts.

I do not have records reflecting the number of cases I have personally tried in courts of record. I would estimate that there must be in excess of fifty, the large majority of which were tried in the early years of my practice.

Additional Questions For Nominees To The United States Court Of Veterans Appeals

LEGAL CAREER AND DESCRIPTION OF TYPICAL FORMER CLIENTS

Upon completion of law school but before graduation, one of my professors hired me to clerk for him and two other lawyers with whom he shared space. The character of their practices were quite different. One of the attorneys specialized in real estate and construction contracts, another specialized in bank work, and the third in tax work. Upon passage of the bar, I was promoted to associate. 1960

4189 Bellaire Boulevard
Houston, Texas 77025
Messrs.: Sam Sterrett, Esq.
Robert Simmer, Esq.
Douglas Pollard, Esq.

In early 1961 I was offered an opportunity to join one of Houston's preeminent insurance defense firms as a participating associate. I was principally a trial lawyer representing interests of insurers and their insureds.
1961-1964

Bryan & Patton
Attorneys at Law
1939 West Gray
Houston, Texas 77019

Because my maritime practice burgeoned, I opened my own law office, sharing space with two other lawyers. While the bulk of my practice as admiralty and maritime law, I did practice general civil law also. 1964-1967

Self Employed
610 Southwest Tower
Houston, Texas 77002

In 1967 I was asked to become Counsel (later Assistant General Counsel) and Assistant to the President of a small conglomerate in Houston. The business of the organization included architectural interiors; glass window walls; furniture, both commercial and retail, and boats. The bulk of my practice involved contract law and personnel law. 1967-1969

Triumph Industries, Inc.
3000 Yellowstone
Houston, Texas 77021

In May of 1969 I was offered the position of Gereral Counsel of the United States General Services Administration which I accepted. 1969-1971

General Services Administration
18th and F Streets N.W.
Washington, DC 20405

LEGAL CAREER AND DESCRIPTION OF TYPICAL FORMER CLIENTS - continued

Because of my background in contract law, in June of 1971 I was offered and accepted the position of General Counsel for the Department of The Navy. 1971-1973

Department of The Navy
The Pentagon
Washington, DC 20350

After roughly four and a half years in government, I was offered and accepted the position of Vice President and Assistant General Counsel of the Columbia Gas System Service Corporation. Upon retirement of the then General Counsel, I assumed that position. The Columbia Gas System, Inc. is a registered public utility holding company under The Public Utility Holding Company Act of 1935. I retired October 1, 1989.

1973-1989

Columbia Gas System Service Corporation
20 Montchanin Road
Wilmington, Delaware 19807

Since August, 1989 I have been an Adjunct Professor of Law at Widener University School of Law. 1989-Current

Widener University School of Law
4601 Concord Pike
P. O. Box 7474
Wilmington, Delaware 19803

Litigation:

Attach a statement describing the ten most significant litigated matters which you personally handled. Give the citations of cases that were reported and the docket numbers and dates of those that were not. Give a capsule summary of the substance of each case. Identify the party or parties whom you represented; describe in detail the nature of your participation in the litigation and the final disposition of the case. Also state as to each case--

(a) the dates of representation;
(b) the name of the court and the name of the judge or judges before whom the case was litigated; and
(c) the names, addresses, and telephone numbers of the individuals who were co-counsel with you and principal counsel for each of the other parties.

Legal activities:

Attach a statement describing the ten most significant legal activities you have pursued (other than the litigated matters referred to above). Describe the nature of your participation, but please omit any information protected by the attorney-client privilege (unless the privilege has been waived).

Outside employment:

Do you have any plans, commitments, or agreements to pursue outside employment, with or without compensation, during your service with the court? If so, please provide details.

No

Party affiliation:

State (a) your current political party affiliation and the place and date it was established, and (b) if you have in the past registered as being with a different party (or as an independent if not now registered as an independent), the place and inclusive dates of such registration.

Since 1974 I have been registered as a Republican in Delaware.

Since my first registration, which was in Illinois, I have

always registered as a Republican.

Additional Questions For Nominees To The United States Court Of Veterans Appeals

LITIGATION

George H.W. Bush et al, Plaintiffs vs. Crawford Martin et al. Civ. A. No. 63-H-266 US Dist Ct, S.D. Texas 1963 reported at 224 F. Supp. 499.

A three judge Federal District Court held that the Texas statute apportioning congressional districts was invidiously discriminatory and unconstitutional and its enforcement would be enjoined. Thus was created the seventh Congressional district of Texas.

Attorneys for Plaintiffs:

Thad Grundy	3300 Citicorp Center 1200 Smith Street Houston, TX 77007
William B. Cassin	address unknown
Hart Mankin	

Attorneys for County Judge and County Clerk:
Joe Resweber, County Attorney   Address unknown

Attorney for Secretary of State, Governor, and Attorney General:
Albert P. Jones, First Assistant Attorney General of Texas

Attorney for Republican State Chairman:
Patrick B. Gibbons   Address unknown

Attorney for Democratic State Chairman:
Will D. Davis   Address unknown

For the past twenty years one of my responsibilities has been supervision of litigation matters for my clients. Litigation on behalf of Columbia Gas has been handled principally by John E. Beerbower, Cravath, Swaine and Moore, One Chase Manhattan Plaza, New York, New York 10005 (202) 428-1000 and Stephen H. Watts II, McGuire, Woods, Battle & Boothe, One James Center, Richmond, Virginia 23219 (804) 644-4131.

LITIGATION - continued

Among the very few litigated matters are:

Allegheny & Western Energy Corporation
vs.
The Columbia Gas System, Inc.
United States District Court for the Southern District of West Virginia
C.A. 2:85 - 0652 1985

Attorneys for Plaintiff:

Vincent V. Chaney	Charleston National Plaza P. O. Box 2031 Charleston, WV 25327-2031 (304) 345-8900
	and
Jeremiah D. Lambert	1900 M Street, N.W. Suite 800 Washington, DC 20036

This case involved alleged violations of the Securities Act of 1933 and the Securities Exchange Act of 1934 which arose out of the sale of a subsidiary of the Columbia Gas System, Inc. (Columbia Gas of West Virginia). An agreed judgment was ultimately entered in the case.

Reynolds Metals Company
vs.
The Columbia Gas System, Inc. et al.

U.S. district Court, Eastern District of Virginia (Mehrige, J.) case no. 87 - 0446-R. Plaintiff claimed that various Columbia companies violated the Sherman Antitrust Act and Virginia antitrust statutes for refusing to transport gas for it. After significant pretrial motion practice, the case was dismissed.

Attorneys for Plaintiffs:

Hunton and Williams	Richmond, VA

Daniel Garshman and Donald Frank, Petitioners
vs.
Securities and Exchange Commission,
U.S. Ct. of App. 3rd Cir. No 86-3008 1986.

The Columbia Gas System, Inc. was Intervenor in an appeal of an SEC order approving, pursuant to the Public Utility Holding Company Act of 1935 the issuance of securities and guarantees. The Third Circuit upheld the order of the SEC and dismissed the Petition for Review.

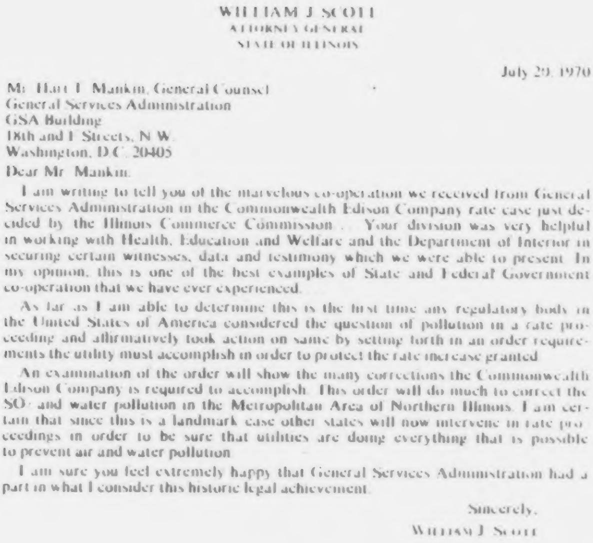
Attorneys for Appellee:
General Counsel
Securities and Exchange Commission

LEGAL ACTIVITIES:

In the early 1960s during a serious encephalitis outbreak in Houston, Texas, I discovered an archaic Texas statute which required the creation of a health district upon petition of a given number of signatories. My family and I collected names and submitted the petition thus causing creation of the Harris County Mosquito Control District. The Harris County Commissioners named me to the Board of the District. The Harris County Mosquito Control District satisfied an important need in the community.

In 1970 the federal government, acting through the General Services Administration, participated in a state regulatory hearing before The Illinois Commerce Commission seeking to condition rate requests by a utility on improvement of its air and water pollution. This was the first time such a theory had been used.

The Attorney General of The State of Illinois wrote me the following letter:



WILLIAM J. SCOTT
ATTORNEY GENERAL
STATE OF ILLINOIS

July 29, 1970

Mr. Hart T. Mankin, General Counsel
General Services Administration
GSA Building
18th and F Streets, N.W.
Washington, D.C. 20405

Dear Mr. Mankin:

I am writing to tell you of the marvelous co-operation we received from General Services Administration in the Commonwealth Edison Company rate case just decided by the Illinois Commerce Commission. . Your division was very helpful in working with Health, Education and Welfare and the Department of Interior in securing certain witnesses, data and testimony which we were able to present. In my opinion, this is one of the best examples of State and Federal Government co-operation that we have ever experienced.

As far as I am able to determine this is the first time any regulatory body in the United States of America considered the question of pollution in a rate proceeding and affirmatively took action on same by setting forth in an order requirements the utility must accomplish in order to protect the rate increase granted.

An examination of the order will show the many corrections the Commonwealth Edison Company is required to accomplish. This order will do much to correct the SO_2 and water pollution in the Metropolitan Area of Northern Illinois. I am certain that since this is a landmark case other states will now intervene in rate proceedings in order to be sure that utilities are doing everything that is possible to prevent air and water pollution.

I am sure you feel extremely happy that General Services Administration had a part in what I consider this historic legal achievement.

Sincerely,
William J. Scott

In 1971 as General Counsel of the General Services Administration one of my responsibilities was the approving state ratification action of the Twenty-Sixth Amendment to the Constitution of The United States. I was honored to have a role in the process of allowing America's young people the right to vote.

The years 1970 and 1971 offered me the opportunity to work closely with the Bicentennial Development Corporation project with Daniel P. Moynihan then Counsellor to the President and with Nathaniel Owings, Chairman of the President's Commission on Pennsylvania Avenue. The Pennsylvania Avenue Development Corporation was the result of the earlier legislative proposals.

The years 1970 and 1971 during which I served as General Counsel for the Committee on Purchases of Blind Made Products, were the beginning years of expansion to other handicapped workers being included in the Committees work. The federal government was reaching out to other severely handicapped.

In 1971 the Department of The Navy was criticized for the volume of contract claims it had outstanding. In 1972 Secretary of The Navy at my request created a Claims Division in the office of General Counsel to address outstanding departmental contract claims on a full time basis. The federal government and the taxpayers benefitted.

The energy shortage of the winter of 1976-1977 caused many schools and factories in the East and mid West to close. Columbia has a facility in Maryland available to receive and regasify liquified natural gas from Alaska. The Jones Act requires U.S. flag ships to transport between U.S. ports. Only foreign flag liquified natural gas tankers were available. I was successful in having the Jones Act waived by the Secretary of the Treasury. Newspaper reports indicated that such a waiver was very rare and Columbia was able to supply much needed gas to its customers during the crisis period.

In the mid 1970s, I represented certain Columbia Gas System subsidiaries before the Federal Power Commission and the Canadian National Energy Board in proceedings involving the Alaskan Gas Pipeline project and The Canadian Gas Pipeline project which were designed to bring natural gas from Alaska to the lower forty-eight states. The project was highly complex and involved a multitude of legal issues.

In the 1980s I managed the legal aspects of Columbia's mergers and acquisitions. Columbia acquired The Commonwealth Gas System in Virginia, The Lynchburg Gas Company, and many smaller retail gas companies. Also, I led the legal negotiations for the sale of Columbia Gas of West Virginia, a retail gas company. Sale of certain assets of a Canadian subsidiary of The Columbia Gas System presented a multitude of complex legal and financial questions on an international level.

Perhaps the most rewarding legal activity is humanizing the law by educating young lawyers, students, and law clerks. Maintaining the law as a profession and not a business is very important to me.

Memberships in certain organizations: The American Bar Association's Commentary to Canon 2 of its Code of Judicial Conduct states, "It is inappropriate for a judge to hold membership in any organization that practices invidious discrimination on the basis of race, sex, religion, or national origin." Do you currently belong, or have you belonged, to any organization which discriminates in this manner -- through either formal membership requirements or the practical implementation of membership policies? If so (a) list all such organizations of which you are or were a member, (b) provide the dates of your memberships, and (c) describe in each case the efforts you made to try to change the organization's discriminatory policies or practices.

None other than my memberships in The University and Whist Club of Wilmington which, until 1988, limited female membership. My employer requested that I join and paid for my membership from 1973-1989. During the course of the years the membership voted on by-law changes allowing women full membership. I voted for such changes. Once changed, I sponsored one of the first women to apply and be accepted for membership in this club.

Services for disadvantaged persons: The American Bar Association in its Comment to Rule 6.1 of its Model Rules of Professional Conduct calls for "every lawyer, regardless of professional prominence or professional workload, to find some time to participate in serving the disadvantaged." Attach a statement describing what you have done to fulfill this responsibility, listing specific instances and the amount of time devoted to each.

Additional Questions For Nominees To The United States Court Of Veterans Appeals

SERVICES FOR DISADVANTAGED PERSONS:

I have regarded volunteer service to be an important part of my life. Most recently I have served as President and Director of the Seamen's Center of Wilmington Incorporated. The Seamen's Center will provide a facility for foreign seamen crewing ships using the Port of Wilmington. This is a combination pastoral ministry and location from which seamen can travel for their personal needs.

On a regular schedule I serve as a volunteer at The Episcopal Church Home in Wilmington, Delaware.

On a larger scale, I recently resigned as Chairman of the Advisory Council on Volunteer Services of The State of Delaware. One of the Council's missions is to advise the Governor and appropriate cabinet officials on volunteer opportunities and suggest state initiatives.

My volunteer service has ranged from ten to forty hours a week over the past ten years. I am constantly reminded of Anne Morrow Lindbergh's statement:

> My life cannot implement in
> action the demands of all the
> people to whom my heart responds.

Selection process:

Has anyone involved in the process of selecting you as a nominee discussed with you any specific case, legal issue, or question in a manner that could reasonably be interpreted as seeking any express or implied assurances concerning your position on such case, issue, or question? If so, please explain fully.

No

Public Service-Public Trust

United States
Office of Government Ethics
P.O. Box 14108
Washington, D.C. 20044

October 27, 1989

The Honorable Alan Cranston
Chairman
Committee on Veterans' Affairs
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

In accordance with the Ethics in Government Act of 1978, I enclose a copy of the financial disclosure report filed by Mr. Hart T. Mankin, who has been nominated by President Bush to be an Associate Judge on the United States Court of Veterans Appeals.

We have reviewed the report and have also obtained advice from the Court of Veterans Appeals concerning any possible conflict in light of its functions and the nominee's proposed duties. As noted in the attachment to Schedule D of the report, Mr. Mankin has agreed, upon being confirmed, to resign from his positions with the Delaware Trust Company, the Seamen's Center of Wilmington Incorporated, the Widener University School of Law -- Board of Overseers, the American Center for Enterprise Education, Inc., and the Delaware State Advisory Council on Volunteer Services.

Based thereon, we believe that Mr. Mankin is in compliance with applicable laws and regulations governing conflicts of interest.

Sincerely,

Donald E. Campbell

Donald E. Campbell
Acting Director

Enclosure

CON 132 64 0
March 1986

STATEMENT FOR COMPLETION BY PRESIDENTIAL NOMINEES

PART I: ALL THE INFORMATION IN THIS PART WILL BE MADE PUBLIC

Name: HOLDAWAY (LAST) RONALD (FIRST) M. (OTHER)

Present address: 9000 Gavelwood Ct. Springfield (CITY) VA (STATE) 22153 (ZIP CODE)

Position to which nominated: Associate Judge, U.S. Court of Veteran's Appeals

Date of nomination: 23 January 1990

Date of birth: 27 (DAY) Nov (MONTH) 1934 (YEAR)

Place of birth: Afton, Wyoming

Marital status: Married

Full name of spouse: Judith Kay Holdaway

Names and ages of children:
Denise Elaine Smith - Age 30
Georgia Ann Robinson - Age 27

Education:

Institution (including city and State)	Dates attended	Degrees received	Dates of degrees
Star Valley High School Afton, Wyoming	1949 - 1953	-	
University of Wyoming Laramie, Wyoming	1953 - 1959	BA, JD	1957 - 1959
Judge Advocate General's School Charlottesville, VA	1966 - 1967	-	-
National Defense University	1977 - 1978	-	

Honors and awards: List below all scholarships, fellowships, honorary degrees, military medals, honorary society memberships, and any other special recognitions for outstanding service or achievement.

Civilian - Law Review

Military - Distinguished Service Medal (two awards)

Legion of Merit

Bronze Star Medal

Air Medal

Meritorious Service Medal (two awards)
Vietnam Service Medal, Vietnam Campaign Medal (4 campaign stars)

Memberships: List below all memberships and offices held in professional, fraternal, business, scholarly, civic, charitable, and other organizations for the last five years and any other prior memberships or offices you consider relevant.

Organization	Office held (if any)	Dates
American Bar Association	None	
Wyoming State Bar Assoc.	None	
Association of the U.S. Army	None	
Retired Officers Assoc.	None	
American Assoc. of Retired People	None	
Transatlantic Council, Boy Scouts of America	Vice President for Administration	1983 - 1987

Employment record: List below all employment (except military service) since your twenty-first birthday, including the title or description of job, name of employer, location of work, and inclusive dates of employment.

None

Military service: List below all military service (including reserve components and National Guard or Air National Guard), with inclusive dates of service, rank, permanent duty stations and units of assignment, titles, descriptions of assignments, and type of discharge.

1960-1963 - Ft Lewis, WA, Ass't Staff Judge Advocate-1st Lt.

1963-1966 - Schofield Barracks, Hawaii, Ass't SJA-Captain

1966-1967 - Student, Judge Advocate General's School-Major

1967-1969 - Senior Instructor, Criminal Law, JAG School-Major

(add.)

1969-1970 - Staff Judge Advocate, 1st Cavalry Div, Republic of Vietnam (Lt. Col.)

1970-1975 - Chief, Government Appellate Division - U.S. Army Judiciary, Falls Church, VA (Lt. Col.)

1975-1977 - Chief Judge Advocate General's Corps - Personnel Division, Pentagon (Lt. Col.)

1977-1978 - Student, National Defense University, Ft. McNair, (Colonel)

1978-1980 - Staff Judge Advocate, VII Corps, Stuttgart, Germany (Colonel)

1980-1981 - Executive Officer to The Judge Advocate General, Pentagon (Colonel)

1981-1983 - Assistant Judge Advocate General, Civil Law, Pentagon (Brig. Gen.)

1983-1987 - The Judge Advocate, U.S. Army Europe, Heidelberg, Germany (Brig. Gen.)

1987-1989 - Commander, U.S. Army Legal Services Agency and Chief Judge, U.S. Army Court of Military Review, Falls Church, VA (Brig. Gen.)

Government experience: List any advisory, consultative, honorary, or other part-time service or positions with Federal, State, or local governments other than those listed above.

None

Published writings: List the titles, publishers, and dates of books, articles, reports, or other published materials you have written.

Voir Dire, A Neglected Tool of Advocacy, 40 Military Law Review 1 (1968)

Litigating Speedy Trial, Army Lawyer (July 1974)

Litigating Defense Request for Witnesses, Army Lawyer (April 1975)

(one copy of each is attached)

Political affiliations and activities:

1. List all memberships and offices held in and financial contributions and services rendered to any political party or election committee during the last 10 years.

None

2. List all elective public offices for which you have been a candidate and the month and year of each election involved.

None

Future employment relationships:

1. Indicate whether you will sever all connections with your present employer, business firm, association, or organization if you are confirmed by the Senate.

Retired - Not Applicable

2. State whether you have any plans after completing government service to resume employment, affiliation, or practice with your previous employer, business firm, association, or organization.

No

3. What commitments, if any, have been made to you for employment after you leave Federal service?

None

4. (If appointed for a term of specified duration) Do you intend to serve the full term for which you have been appointed?

Yes

5. (If appointed for an indefinite period) Do you intend to serve until the next Presidential election?

Potential conflicts of interest:

1. Describe any financial arrangements, deferred compensation agreements, or other continuing financial, business, or professional dealings which you have with business associates, clients, or customers who will be affected by policies which you will influence in the position to which you have been nominated.

None

2. List any investments, obligations, liabilities, or other financial relationships which constitute potential conflicts of interest with the position to which you have been nominated.

None

3. Describe any business relationship, dealing, or financial transaction which you have had during the last five years, whether for yourself, on behalf of a client, or acting as an agent, that constitutes a potential conflict of interest with the position to which you have been nominated.

None

4. Describe any lobbying activity during the past 10 years in which you have engaged for the purpose of directly or indirectly influencing the passage, defeat, or modification of any Federal legislation or for the purpose of affecting the administration and execution of Federal law or policy.

None

5. Explain how you will resolve any potential conflict of interest that may be disclosed by your responses to the above items. (Please provide a copy of any trust or other agreements involved.)

None

Testifying before the Congress:

1. Do you agree to appear and testify before any duly constituted committee of the Congress upon the request of such committee?

Yes

2. Do you agree to provide such information as is requested by such a committee?

Yes

AFFIDAVIT

State of Virginia) ss
County of Fairfax , being duly sworn, hereby states that he/she has read and signed the foregoing Statement for Completion by Presidential Nominees and that the information provided therein is, to the best of his/her knowledge and belief, current, accurate, and complete.

Ronald M. Holdaway
Signature of Nominee

Subscribed and sworn before me this 26thday of January , 1990.

Mary B. Dennis
Notary Public
My commission expires: 7-27-90

VOIR DIRE—A NEGLECTED TOOL OF ADVOCACY*

By Major Ronald M. Holdaway**

The author analyzes and compares the use of voir dire examination in civilian courts against such examination in the military courts-martial. He discusses those areas of examination which tend to expose matters such as bias or interest, the extent to which voir dire may be used to develop a theory of defense on the case, and the degree of control which may be exercised over the voir dire by judges and law officers. He concludes by offering practical suggestions for conducting a successful voir dire examination.

I. INTRODUCTION

Voir dire examination of jurors is considered by many leading trial lawyers to be an extremely valuable tool of advocacy quite apart from its connection with the challenging process.[1] In civilian jurisdictions it is not uncommon for the examination of prospective jurors to take several hours or even several days as lawyers skillfully use it not only to develop possible challenges, but also as sounding boards for their theory of the case. On the other hand, use of voir dire in courts-martial is relatively neglected. This is not to say that voir dire is nonexistent in military courts; it probably is used and used effectively. Yet personal experience of the writer, his discussion with other military counsel and law officers, and a study of the relatively few cases reaching appellate level compel the conclusion that by and large, there is either no voir dire or, if an examination is conducted, it tends to be very perfunctory in nature. Therefore, the goal of this article is to develop the law of voir dire, its purposes and limitations, and the thesis that examination of prospective court members can and should be an effective tool of military advocacy provided it is carefully prepared and executed. Finally, an attempt will be made to state some practical and useful suggestions as to how to prepare and conduct voir dire examination.

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*This article was adapted from a thesis presented to The Judge Advocate General's School, U. S. Army, Charlottesville, Virginia, while the author was a member of the Fifteenth Advanced Course. The opinions and conclusions presented herein are those of the author and do not necssarily represent the views of The Judge Advocate General's School or any other governmental agency.

**JAGC, U. S. Army; Military Justice Division, The Judge Advocate General's School; B.A., 1957, LL.B., 1959, University of Wyoming; admitted to practice before the bars of the State of Wyoming, the U. S. Supreme Court, and the U. S. Court of Military Appeals.

[1] *See, e.g.*, I. M. BELLI, MODERN TRIALS 796 (1954).

II. PURPOSES OF VOIR DIRE EXAMINATION

The origin of voir dire examination of prospective jurors is rather obscure. No doubt it developed as a natural concomitant of the right to an impartial jury.[2] The major purpose of examining the jury was then and remains now, at least ostensibly, to discover possible challenges against prospective jurors. Discussed below, however, are three purposes for conducting voir dire examination.

A. *DISCLOSING DISQUALIFICATION OR ACTUAL BIAS*

All jurisdictions in the United States allow inquiry to disclose disqualification or actual bias.[3]

B. *AID IN EXERCISING PEREMPTORY CHALLENGES*

Voir dire was considerably expanded by the inclusion of peremptory challenges. Most jurisdictions, though not all,[4] will allow examination which will reasonably aid in a more intelligent exercise of peremptory challenges. Since such a challenge is often exercised on the basis of a juror's personal background and beliefs, the scope of inquiry is naturally rather broad.[5]

C. *A TACTICAL DEVICE TO INDOCTRINATE THE JURY*

This use of voir dire will be the main focus of this article. By indoctrination is meant that the question itself is designed to have an influence on the juror and his answer thereto is only incidental or of little significance. Such a question may be little more than an attempt to create rapport with the juror (or in courts-martial, the court member—the terms are interchangeable for purposes of this article). However, more often the purpose of the question will be to advise, in an interrogatory form, the juror of certain rules of law, defenses, or facts expected to arise in the case in such a way as to ally the juror with the counsel's side or theory of the case. For example, the following question does not really anticipate a negative response: "Do you agree with the rule of law that requires acquittal in the event there is reasonable doubt?" The rule of reasonable doubt is one of the fundamental principles of our criminal law and is known as such by most of our citizens; therefore, even in the instance where a court member did not particularly agree with the rule, he would hardly acknowledge so in open court. The real reason for such a question is, in a sense, to put the member on notice right from the start that there might be reasonable doubt in the case and to get him mentally familiar with the rule in the hope that he will look for reasonable doubt in the case and vote to acquit. It makes it more likely, furthermore, that in the decision-making process the member will be more aware than he otherwise would have been of the principle of reasonable doubt; he will have committed himself to believing it, and perhaps by emphasizing it at the voir dire and, of course, during summation, the rule will be enlarged in his mind. Therefore, particularly in cases where the facts are close or the defense technical, skillful examination of the jurors or court members may well prove important in the eventual outcome of the case.

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[2] *See* 4 W. BLACKSTONE COMMENTARIES 352–55 (13th ed. 1800).

[3] *See, e.g.*, State v. Higgs, 143 Conn. 138, 120 A.2d 152 (1956); People v. Car Soy, 57 Cal. 102 (1880). *See also*, Morford v. United States, 339 U.S. 258 (1949), wherein the Supreme Court held that the constitutional right to a jury trial was infringed when defense counsel was precluded from interrogation as to actual bias.

[4] *See, e.g.*, People v. Raney, 55 Cal.2d 236, 359 P.2d 23 (1961); McGee v. State, 219 Md. 53, 146 A.2d 194 (1959).

[5] *See, e.g.*, Lightfeet v. Commonwealth, 310 Ky. 151, 219 S.W.2d 984 (1949); Sorrentino v. State, 214 Ark. 115, 214 S.W.2d 517 (1948).

Having pointed out this third use of voir dire and having noted that the focus of this article is its use as a means of advocacy, a note of caution is appropriate. Voir dire is part of the challenging procedure; therefore, its only *legitimate* use is as part of that challenging procedure.[6] That it may be useful for indoctrination purposes does not change the requirement that it ostensibly relate to possible challenges—either peremptory or for cause. Thus while the farthest thing from counsel's mind might be a potential challenge, he is still obliged to frame the question so that it appears relevant to a possible challenge. This must be understood as it colors the whole spectrum of the law of voir dire. Many of the problems concerning permissible scope of examination, as will be seen, arise from a failure of counsel properly to phrase their questions so that the responses thereto appear to relate to a challenge. For example, it is fairly common to preface a question concerning a rule of law as to whether the juror understands the rule. Such a question will generally be held improper.[7] Whether the juror *understands* the law does not go to his qualifications or existence of prejudice (absent a response indicating a mental incompetency).[8] On the other hand, what a juror's attitude is toward the law might well go to his ability to be impartial and hence his qualification to hear the case.[9] Therefore, a slight change in phrasing, showing an understanding of the form voir dire examination must take, may be the difference between a proper and an improper examination.

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[6] *See, e.g.*, Kephart v. State, 93 Okla. Crim. 451, 229 P.2d 224 (1951); State v. Bauer, 189 Minn. 280, 249 N.W. 40 (1933); State v. Hoagland, 39 Idaho 405, 228 P. 314 (1924).

III. THE LAW OF VOIR DIRE IN CIVILIAN JURISDICTIONS

The emphasis of this article is the use of voir dire in military courts-martial. Yet, as in many other phases of courts-martial procedure and practice, the civilian law forms the basis for the military law. An understanding of the general principles applicable in federal and state jurisdictions will not only enable the military counsel better to understand the law of voir dire, but will be very instructive in formulating more effective ways of conducting voir dire examination in military courts.

There are two main problems that arise in civilian practice. The first problem pertains to who should properly conduct the examination; the second and most vexatious pertains to the proper scope of the examination.

A. *WHO CONDUCTS VOIR DIRE EXAMINATION?*

There is no unanimity as to whether the trial judge or counsel should conduct the voir dire examination. Some states have held that counsel has no absolute right to ask questions of the jurors;[10] while others, conceding the judge to be chiefly responsible for examinations, have found error in completely pre-empting counsel from supplementary examination.[11] Most jurisdictions, however, contemplate an examination participated in by both court and counsel. Even where the judge has chief responsibility, he is often under some obligation to allow supplementary examination by counsel.[12] The litigation has arisen as to how far the judge could go in cutting off inquiry and whether the actions of the judge were prejudicial under the circumstances.[13] If there is such a thing in this area as a modern trend, it is the practice of taking voir dire from counsel and giving the trial judge the main responsibility for examination of the jurors. This practice no doubt has arisen because of real or imagined abuses of counsel in using the examination as a springboard to indoctrinate the court, a subject to be covered later on. The federal courts greatly restricted counsel by rule 24, Federal Rules of Criminal Procedure,[14] which, in effect, gives the trial judge the authority to conduct the voir dire and permits the judge, should he so desire, to compel counsel to submit questions to him in writing. The Supreme Court of Illinois by rule forbids any questions concerning the law or instructions;[15] and, as will be seen, the wide discretion given to the judge in regulating the scope of voir dire examination in all jurisdictions has greatly curtailed counsel, even in those states where counsel has chief responsibility for examination.[16]

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[7] *See, e.g.*, People v. Harrington, 138 Cal. App.2d 902, 291 P.2d 584 (1955).

[8] *Id.*

[9] *See* People v. Wein, 50 Cal.2d 383, 326 P.2d 457 (1958); State v. Plumlee, 177 La. 687, 149 So. 425 (1933).

[10] *See, e.g.*, Bryant v. State, 207 Md. 565, 115 A.2d 502 (1955); Commonwealth v. Taylor, 327 Mass. 641, 100 N.E.2d 22 (1951).

[11] *See, e.g.*, Blount v. State, 214 Ga. 433, 105 So.2d 304 (1958); State v. Guidry, 160 La. 655, 107 So. 479 (1926).

B. *PERMISSIBLE SCOPE OF EXAMINATION*

There are two general rules which are cited in almost every case that considers the permissible scope of voir dire examination. The first, and one already alluded to, is that examination of the jury is limited to questions which relate to a possible challenge.[17] The second rule is that the judge is vested with wide discretion in determining whether the inquiry is relevant and proper.[18] As to the first rule—the necessity of relating inquiry to possible challenges—there are few problems raised when counsel is truly seeking possible disqualification or subjective bias on the part of the juror. The statutes that set forth juror qualifications vary greatly. Suffice it to say that examination concerning statutory eligibility is not only permissible but in at least one state mandatory.[19] Also, where counsel is seeking facts showing subjective bias on the part of the juror such as prior knowledge of the case, relationship with one of the parties, or actual prejudice, there will be little question but that the inquiry is within proper limits.[20] The other broad area of challenges is, of course, peremptories. In connection with this type of challenge, it is generally held that counsel may interrogate the juror as to that part of his personal, social, and economic background that would reasonably aid counsel in exercising his peremptory challenges.[21]

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[12] CAL. PENAL CODE, § 1078 (West 1956). *See generally* Hamer v. United States, 259 F.2d 274 (9th Cir. 1958), wherein the court held that precluding counsel from personally asking questions pursuant to rule 24, Federal Rules of Criminal Procedure, was not violative of the defendant's constitutional rights. However, the court did look to the voir dire posed by the judge to ensure that it was adequate and fair.

[13] *Compare* People v. Boorman, 142 Cal. App.2d 85, 297 P.2d 741 (1956), *with* People v. Coen, 205 Cal. 596, 271 P. 1074 (1928).

[14] FED. R. CRIM. P. 24.

[15] *See* Christian v. New York Cent. R.R., 28 Ill. App.2d 57, 170 N.E.2d 183 (1960).

[16] *See, e.g.*, Roby v. State, 215 Ind. 55, 17 N.E.2d 800 (1938); State v. Hoagland, 39 Idaho 405, 228 P. 314 (1924); State v. Douthitt, 26 N.M. 532, 194 P. 879 (1921).

[17] *See* cases cited note 6 *supra*.

[18] *See, e.g.*, State v. Hoagland, 39 Idaho 405, 228 P. 314 (1924).

Therefore, so long as the question clearly relates to a juror's subjective fairness, ability to be fair in a general sense, or his background there will be little problem as to scope of examination. The problems have developed when counsel has sought to influence or indoctrinate the jury by means of voir dire examination concerning the facts or law of the case. This might be termed inquiry, not to determine an ability to be fair in general, but an inquiry concerning an ability to be fair in general, given specific facts, defenses, or rules of law that will be part of the case. Judges, no doubt discerning the true intent of such examination, have resisted such questions and a fairly considerable body of case law has developed testing the judge's discretion in regulating the scope of examination. The question usually takes the form of a hypothetical one that attempts to obtain a commitment from a juror as to how he would react to certain issues which may be developed at the trial. Appellate courts go in every possible direction in these situations. The questions that can be asked and the way in which they can be are infinite in their variety. Accordingly, it is impossible to categorize with any accuracy those questions which are permissible and those which are not. There are some general guidelines which might be helpful so long as the reader recognizes that the application of these principles is by no means universal and that they are sometimes inconsistently applied even within a single appellate jurisdiction.

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[19] *See* Commonwealth v. Taylor, 100 N.E.2d 22, 327 Mass. 641 (1951).

[20] *See, e.g.*, Morford v. United States, 339 U.S. 258 (1949); State v. Higgs, 143 Conn. 138, 120 A.2d 152 (1956).

[21] *See* I. F. BUSCH, LAW AND TACTICS IN JURY TRIALS § 84 (1959).

It has been said that hypothetical questions and questions concerning the law of the case are improper.[22] This is much too broad a statement. If such questions are held improper (or properly excluded) it generally will not be because of the hypothetical nature of the question or because it touches on the law of the case, but rather because there is a defect in the form of the question or because the purpose of the question shows no clear relationship to a possible challenge. Thus, questions which seek a commitment from a juror as to how he will decide the case,[23] or what impact certain facts or law will have on him,[24] or, what his understanding of the law is[25] will generally be excluded because the purpose of the question does not relate to anything which could form the basis of either a challenge for cause or a peremptory challenge; the purpose is to gain a commitment from the juror prior to the time he has heard any evidence. Illustration of questions defective as to form, as distinguished from content, would be those that are repetitious,[26] ambiguous, confusing, or awkwardly worded. Also, those which incorrectly state the law or inaccurately or incompletely state the facts[27] would fall in this category.

It would seem to follow then that if a question is carefully framed to show a clear relation to a possible challenge and avoids defects as to form, the problems just referred to could be avoided. However, it is not that simple. The rule that vests wide discretion in the trial judge makes it by no means certain that an ostensibly proper question will be allowed or conversely that a seemingly improper question will be excluded. For example, in *State* v. *Douthitt*,[28] a case decided by the Supreme Court of New Mexico, the following question was disallowed by the trial judge: "[C]ould [you] give the defendants the benefit of reasonable doubt if such doubt should exist?"[29] Relying on the discretion of the trial judge, the court, while finding nothing particularly wrong with the question itself, said that there was no clear abuse of the judge's discretion in denying the question.

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[22] *Id.*

[23] Kephart v. State, 93 Okla. Crim. 451, 229 P.2d 224 (1951); State v. Bauer, 189 Minn. 280, 249 N.W. 40 (1933); Christianson v. United States, 290 F. 962 (6th Cir. 1923).

[24] State v. Smith, 234 La. 19, 99 So.2d 8 (1958); State v. Dillman, 183 Iowa 1147, 168 N.W. 204 (1918).

[25] People v. Harrington, 138 Cal. App.2d Supp. 902, 291 P.2d 584 (1955).

[26] People v. Modell, 143 Cal. App.2d 724, 300 P.2d 204 (1956).

[27] State v. Zeigler, 184 La. 829, 167 So. 456 (1936).

[28] 26 N.M. 532, 194 P. 879 (1921).

[29] *Id.*

Certainly a persuasive argument could be made that the question was proper. A negative response would clearly be a cause for a challenge.

On the other hand, there are several cases in which either the prosecutor or the trial judge was allowed to ask a question which seems improper according to the general guidelines set forth above, yet has been held properly allowed.[30] There are, as a result, seemingly contradictory rules within a single appellate jurisdiction.[31] However, a rule that truly does vest wide discretion in the trial judge presupposes that results need not be uniform. Trial judges within the same appellate jurisdiction can and will have differing attitudes as to what the proper scope of voir dire should be. Therefore, the appellate courts have consistently refused to impose a uniformity on them except within very broad limits.

At this point it would be traditional to attempt to analyze and summarize the law as to the proper scope of voir dire examination in civilian jurisdictions. It should be evident, however, that this would be virtually impossible aside from the basic rule that examination must relate to challenges and whether it does is within the discretion of the trial judge. The cases in this area are decided very much on an ad hoc basis and whether the judge is found to have abused his discretion, a very rare thing,[32] probably depends on whether the appellate court thinks it important enough to base a reversal on. Subsequent portions of this article will attempt to make a more detailed breakdown as to the questions commonly asked, and an effort will be made to show how the courts have approached the problem of the proper scope of an examination on specific questions. The best that can be said in a general way concerning counsel's dilemma in determining whether a question is going to be held proper or improper is that if he wishes to have the best possible chance of having the question allowed he must be certain that the inquiry is related to a possible challenge, accurately states the law and/or facts, and is correct as to form.

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[30] *See, e.g.*, Stovall v. State, 233 Ark. 597, 346 S.W.2d 212 (1961).

[31] *Compare* People v. Guasti, 110 Cal. App.2d 456, 243 P.2d 59 (1952), *with* People v. Wein, 50 Cal.2d 383, 326 P.2d 457 (1958); State v. Hoagland, 39 Idaho 405, 228 P. 314 (1924), *with* State v. Pettit, 33 Idaho 319, 193 P. 1015 (1920); State v. Peltier, 229 La. 745, 86 So.2d 693 (1956), *with* State v. Normandale, 154 La. 523, 97 So. 798 (1923).

[32] In relation to the number of cases that have tested the discretion of the court, those finding an abuse of discretion are extremely small. Those resulting in reversal show no common rationale but merely point up the ad hoc approach that is taken in this area. *See, e.g.*, People v. Raney, 213 Cal. 70, 1 P.2d 423 (1931); Territory v. Lynch, 18 N.M. 15, 133 P. 405 (1913); People v. Car Soy, 57 Cal. 102 (1880).

IV. VOIR DIRE EXAMINATION IN MILITARY PRACTICE

In the introduction it was pointed out that examination of the court members is probably not nearly as extensive in courts-martial as it is in most civilian jurisdictions. This is an empirical observation of the writer gained from both personal experience and discussion with other military counsel and law officers. As the military system actively promotes appeals as to any possible defect that might have occurred at the trial,[33] it is surprising that there are relatively few appellate cases. Of course there are differences between courts-martial and civilian trials that partly account for this. For example, the composition of the court is known in advance. Therefore, counsel will have an opportunity to make inquiries concerning court members in advance of trial, although it should be noted parenthetically that this advantage is probably not exploited as much as it could be. Quite often too, a military counsel will know many of the members of the court at least casually. Also, a court sits for more than one case; this will afford an opportunity to observe the members, and, of course, if voir dire is conducted in the first case or two, it will make it less necessary in subsequent cases. Then too it should be considered that the ordinary military court is a relatively homogeneous body, at least compared to the average civilian jury; there is a rough similarity of background, interests, and economic and social status. In short, the military court is much more of a known quantity and very many of the questions asked of a jury in a civilian trial, which seek basic information concerning the personality and background of the juror, are simply not necessary in a court-martial. Another factor leading to a less extensive examination is that an accused is only entitled to one peremptory challenge and unless the challenge reduces the membership below five members no one is appointed to replace the challenged member. Therefore, the somewhat exhausting and exhaustive process of repeating questions to a prospective juror who is called to replace one challenged is avoided.

Perhaps another reason which would explain in part the less extensive examination of the court, if the reader will accept the assumption that it is less extensive, is inherent in the military structure of the court. There is a tradition, very real to some, that says that an officer will do his duty and is not to be questioned or put on oath about his ability to do so, particularly by one junior in rank. This attitude as it applies to examination of the court is exemplified in a comment made by The Judge Advocate General of the Army during World War II in an indorsement to a general court-martial that had been submitted to him for review and transmittal to the Secretary of War. There had been a voir dire conducted during the trial, the nature and extent of which are not contained in the opinion, but it apparently was an inquiry pertaining to the law of the case. In discussing the propriety of such an examination of the court, The Judge Advocate General said: "[Voir dire] assumes that there may be members of the court who are unwilling to follow the mandates of the law and is a gratuitous assumption carrying aspersions which are unfair and unauthorized."[34] That there has been a change in the official line goes without saying; examination is specifically allowed by the *Manual for Courts-Martial*,[35] and certainly has the blessing of the Court of Military Appeals. In fact, one case found that failure to voir dire the court was an error in tactics that indicated, along with other deficiencies, inadequate representation.[36] Yet the old attitude hangs on and from time to time there is a case where attempted examination of the court provokes an outburst from a "traditionalist" that he resents his word being questioned.[37] Undoubtedly some counsel, particularly those junior in rank, are deterred from at least some exmination because of this.

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[33] Review is automatic for all general courts-martial and most of them include a free transcript of the court-martial record as well as furnishing of appellate defense counsel. The raison d'etre of appellate defense is to carefully "fly-speck" a record for any and all errors at the trial level.

Yet aside from the fact that the membership of the court is known in advance, the reasons for voir dire would appear to be just as persuasive as in civilian trials; perhaps more in some instances. Certainly anytime there is even the hint of improper command influence, a factor unknown in civilian criminal law, voir dire becomes a necessity. Also, the fact that the court-martial is the sentencing agency would seem to call for more and broader examination of the court's attitude towards crime and punishment.[38] Consider also that in many instances the military community is relatively small and perhaps parochial in its outlook; this would seem to call for inquiry concerning knowledge of the case and relationship of the court members with the parties, witnesses, or convening authority, and attitudes towards courts-martial in general. The military procedure then, although perhaps calling for a less extensive examination of the "jurors," should not discourage the necessity for examination and, in fact, might indeed demand a more incisive examination than would be true in civilian trials.

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[34] B.R. (E.T.O.) 2203, Bolds (1944).

[35] MANUAL FOR COURTS-MARTIAL, UNITED STATES, *1951*, para. 62*b*.

[36] *See* United States v. McMahan, 6 U.S.C.M.A. 709, 21 C.M.R. 31 (1956).

[37] *See* United States v. Lynch, 9 U.S.C.M.A. 523, 26 C.M.R. 303 (1958).

[38] The Court of Military Appeals has recognized that the court-martial sentencing powers make relevant the attitudes and beliefs of court members. *See, e.g.*, United States v. Fort, 16 U.S.C.M.A. 86, 36 C.M.R. 242 (1966); United States v. Cleveland, 15 U.S.C.M.A. 213, 35 C.M.R. 185 (1965).

The United States Court of Military Appeals (hereinafter referred to as the court) has developed a rule, discussed hereinafter, not too different in form to that discussed above as to civilian jurisdictions. Yet the substance of the rule has a subtle difference as to emphasis which implies a much broader examination.

In the military there is no problem as to who is to conduct voir dire examination. The *Manual for Courts-Martial* states in paragraph 62*b* that counsel "may question the court," and although formerly Judge Latimer expressed a preference for the federal rule which gives the trial judge chief responsibility,[39] this view was disputed in the same case by Judge Quinn and has not been brought up again in any reported case. However, there is no doubt that the law officer has the right to supplement counsel's examination should he so desire.[40] The troublesome question that the court has been called on to decide is, as is true in civilian jurisdictions, the proper limits of voir dire examination. The use or attempted use of the examination to indoctrinate the members of the court-martial has been the chief cause of most of the litigation. The landmark case, the one which definitively stated the rule and the one which is cited in every case since is *United States* v. *Parker*,[41] decided in 1955. There were several questions asked on voir dire, all of which were obviously designed to indoctrinate rather than obtain an answer. The following colloquy took place:

> DEFENSE COUNSEL: Is there any member of the court who would, though finding any reasonable doubt in his mind as to the guilt of the accused, nevertheless find the accused guilty?
>
> LAW OFFICER: That question is improper because the court will be instructed on reasonable doubt at the time the law officer gives his instructions. That question will not be answered.

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[39] *See* United States v. Parker, 6 U.S.C.M.A. 274, 19 C.M.R. 400 (1955).

[40] *Id.* at 282, 19 C.M.R. at 408.

[41] 6 U.S.C.M.A. 274, 19 C.M.R. 400 (1955).

> DEFENSE COUNSEL: Very well, is there any member of the court who, while being instructed on matters given by the law officer, would feel he personally is privileged to go ahead and arrive at conclusions disregarding the instructions given by the law officer?[42]

The latter question was also disallowed. The court stated that generally as to scope of voir dire:

> [The members of the court-martial] may be asked any pertinent question tending to establish a disqualification for duty on the court. Statutory disqualifications, implied bias, actual bias, or other matters which have some substantial and direct bearing on an accused's right to an impartial court. . . .[43]

In applying this general principle to the case, while upholding the rulings of the law officer, the court said:

> [W]e do not seek to encourage law officers to be miserly with counsel on the preliminary examination. Within the military system, if any reason is advanced therefor, we think the law officer who either inquires himself or permits inquiry to determine with certainty that court-martial members will accept their law from the law officer, follows a desirable course.[44]

Concerning the questions in this particular case, Judge Latimer stated:

> Perhaps as to these particular questions, the law officer would have been wiser had he permitted them to be answered, although negative responses were inevitable. But one of the well-recognized rules of criminal jurisdiction is that wide discretion is vested in trial judges as to the questions which must be answered by jurors on voir dire. Appellate courts should reverse only when a clear abuse of discretion, prejudicial to the defendant, is shown. Conceding that the purposes of voir dire are to determine whether individual jurors can fairly and impartially try the issues, and to lay a foundation so that peremptory challenges can be widely exercised, those purposes do not permit the examination to range through fields as wide as the imagination of counsel. Because bias and prejudice can be conjured up from many imaginary sources and because peremptory challenges are uncontrolled except as to number, the areas in which counsel seeks to question must be subject to close supervision by the law officer.[45]

The rule as thus stated and the rationale to support it are not different in any substantial respects from the rules earlier discussed that apply in most civilian courts; examination is limited to inquiry touching upon challenges for cause or that which will aid in the exercise of peremptory challenges. While some latitude should be given counsel, the law officer has broad discretion and only clear abuse on his part will be considered error. Yet it is apparent that the court is troubled to some extent by the law officer's ruling. In the part of the opinion just quoted, the court concedes that it "would have been wiser" to allow the question and that law officers should not be "miserly with counsel" in limiting the scope of examination. In another part of the opinion, wherein Judge Latimer prefaces the discussion on voir dire with some general considerations, he states that "when there is a fair doubt as to the propriety of any question, it is better to allow it to be answered. While materiality and relevancy must always be considered to keep the examination within bounds, they should be interpreted in a light favorable to the accused."[46] There is then, as contrasted with civilian jurisdictions, much more emphasis on the accused's rights to impartial triers of fact. Perhaps there is even a hint that the court has reservations about a military court's ability to be impartial. Anyone who read this opinion in 1955 could not have been too surprised, considering the language in it, to see the emphasis shift in later cases from the wide discretion of the law officer to the wide latitude to be allowed counsel. This has happened.

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[42] *Id.* at 279–80, 19 C.M.R. at 405–06.

[43] *Id.* at 279, 19 C.M.R. at 405.

[44] *Id.* at 282, 19 C.M.R. at 408.

[45] *Id.* at 280, 19 C.M.R. at 406.

Consider the following colloquy from United States v. Sutton,[47] decided in 1965:

> DC: . . . .
>
> Major, if a reasonable doubt were raised in your mind, would you vote for a finding of guilty—
>
> LO: Well, I'll interrupt that question.
>
> On voir dire examination preliminary to challenges, the members of the court-martial may be asked any pertinent question tending to establish a disqualification for duty on the court. Statutory disqualification, implied or actual bias, or any other matter which would have some substantial doubt—I correct myself—which would have some substantial and direct bearing on the accused's right to an impartial court as exercised through his challenges for cause, are proper subjects for inquiry. While counsel will be allowed considerable latitude, each will be expected to stay within the bounds which I have just indicated in asking any questions.
>
> Now, the question that you just put [Captain] undertakes to go into the matter of what the law of the case will be. When this court gets ready to make its decision they must take the law from

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[46] *Id.* at 279, 19 C.M.R. at 405.

[47] 15 U.S.C.M.A. 531, 36 C.M.R. 29 (1965).

> me. You do not know what the law is going to be as it applies to this case at this time, and consequently, I think that I will hold that this is not a proper question on voir dire.
>
> You may proceed within the limitations that I have indicated, but before you do so I turn to each member of the court and say that each of you should listen carefully to any question asked. If you do not understand the question you should say so. If you wish to enlarge any answer to a question calling for a "yes" or "no" to express yourself clearly, you should say so.
>
> . . . .
>
> DC: In view of the ruling by the law officer, the defense has no further questions of the court.[48]

Pause briefly and consider the importance this exchange must have had in the minds of the participants. Had counsel been fully conversant with the case law, and particularly *Parker*, he would not have been surprised by the law officer's ruling; no doubt the law officer felt confident of the correctness of his ruling. The question asked was almost identical to the first question asked in *Parker*. The law officer quoted almost verbatim from the general rule cited in *Parker* as to the permissible scope of voir dire in making this ruling. It is true that he placed the emphasis on his discretion and paid lip service to that portion of *Parker* enjoining him to be liberal in his rulings, yet such a rule presupposes, implicitly anyway, that lip service will have to be paid to one facet or another of the rule. You cannot give the law officer wide discretion and at the same time give wide latitude to counsel; one or the other has to be dominant. The law officer in *Sutton* must have been certain that he properly exercised his discretion and would be upheld on review of the case. There is nothing certain in the law; the court found error in the law officer's ruling and somehow managed to quote *Parker* as precedent.

> While an accused is not entitled to favorable court members or any particular kind of juror, he is guaranteed the right to a fair-minded and impartial arbiter of the evidence. . . . When one is found to be willing to convict, though he entertains a reasonable doubt of guilt, he fails to accord the proper scope to the presumption of innocence and may be imbued with the concept that the accused may be blameworthy, else he would not stand arraigned at the bar of justice. And to those who doubt the existence of such beliefs on the part of some court members, we point to our decisions in United States v. Carver and United States v. Deain. . . . Thus, it seems entirely proper for counsel to interrogate a member, as in this case, as to whether he entertains such beliefs and would convict despite a reasonable doubt of the accused's guilt.[49]

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[48] *Id.* at 534–35, 36 C.M.R. at 32–33.

[49] *Id.* at 536, 36 C.M.R. at 34.

This quote from *Sutton* could have been equally applicable to *Parker*. In *Sutton*, both sides on appeal cited *Parker*, the government relying on the "wide discretion" of the law officer and the defense relying on the "wide latitude" to be allowed counsel. It would be oversimplifying to say that the court was successful in distinguishing the facts. They were not that different. Yet instead of overruling *Parker* directly, the court did attempt to reconcile it. Four general distinguishing facts were pointed to: (1) The inquiry was not general, but was directed to one member; (2) the law officer misunderstood the purpose of the question; the question did not go into the law of the case, but rather was an inquiry into the member's belief in the law; (3) the guidelines of the law officer excluded voir dire as an aid in peremptory challenges; and (4) this cautionary instruction to the court indicated that counsel was trying to trap them. There was also some indication that the court felt *Parker* was partly based on a suspicion that counsel did not ask the question in good faith.[50] In any event *Sutton*, while ostensibly relying on the *Parker* case, emphasizes the point that had been merely referred to in *Parker*, that is that counsel *should* be allowed a wide latitude and slid over the crux of *Parker*, which was the wide discretion to be accorded to the law officer.

Other cases, one quite recent, might indicate that the court has not wholly abandoned the law officer. In *United States* v. *Freeman*[51] *and United States* v. *Fort*,[52] the rulings of the law officers, excluding questions, were upheld. In *Freeman*, the following question was excluded by the law officer:

> IC: . . . Now gentlemen, is there anybody on this court who does not think, in his own opinion, that a person can be so drunk that they cannot entertain a specific intent and a prescribed offense, such as, say, the intent to wilfully disobey an order, or say, the intent to deprive somebody, permanently of their property?[53]

Appellate defense counsel construed this as asking whether anyone had a prejudice against intoxication as a defense; thus they tried to fit it into the rationale of *Sutton*. The law officer apparently construed it as asking how the court would decide the case and based his ruling on that. The court felt it could be construed either way. In their holding they pointed out that all the law officer did was point out the infirmities in the question and emphasized that the ruling of the law officer did not prohibit further questioning.[54] There is then an implication that the general line of inquiry was proper.

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[50] *Id.* at 535, 36 C.M.R. at 33.

[51] 15 U.S.C.M.A. 126, 35 C.M.R. 98 (1964).

[52] 16 U.S.C.M.A. 86, 36 C.M.R. 242 (1966).

[53] United States v. Freeman, 15 U.S.C.M.A. 126, 128, 35 C.M.R. 98, 100 (1964).

Similarly in *Fort*, wherein the charge was indecent assault on a 68-year-old woman, the following colloquy took place:

> DC: In spite of any mitigation, or extenuating circumstances. Just the sole fact of conviction on this charge. Regardless of what may be presented in the case. Regardless of what may be presented in extenuation. Do you think this would require a punitive discharge?
>
> PRES: I think it might. I don't know that it would require it absolutely, but you made an assumption that he is guilty. This is an assumption that we don't know yet.
>
> LO: I don't think we ought to carry this—I think the question is improper because of the way it is worded.
>
> DC: Sir, can I rephrase the question?
>
> LO: All right, rephrase the question. You make it a very difficult question to answer because the nature of the offense in itself calls for a punitive discharge. The nature of the offense itself, if one is found guilty, calls for a punitive discharge and other accessories. The way you have the question worded makes it difficult for anyone to answer it.
>
> DC: Well, my question is this, sir, I'll rephrase it, that regardless of what it presented in mitigation or extenuation, regardless of what comes in at this point, that you would require—that you would find that this would require a punitive discharge, regardless of what might be brought in later as to the circumstances surrounding the—or any extenuation or mitigation.
>
> PRES: Well, I think it might.
>
> LO: Does any member of the court wish to comment?
>
> MEMBER: I think it might.
>
> LO: I think the question is highly improper and I don't think we'll go into this discussion. If you wish to question the members individually, you may do so. I think that collectively it is difficult to answer this question anyway.[55]

On appeal when the rulings of the law officer were attacked, *inter alia*, for improperly curtailing voir dire examination, the court, citing *Parker*, found that the law officer did not abuse his discretion. Had they left it at that then perhaps there would have been an indication that the pendulum was swinging back to the discretion of the law officer. However, the court stressed the fact that the law officer did not foreclose further inquiry but merely directed that under the circumstances the inquiry would have to be on an individual basis; this ruling was proper they said in view of the fact that individual members had indicated a possible ground of disqualification. The clear implication again is that the content of the inquiry was proper and that a ruling of the law officer which shut it off entirely would have been error.[56]

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[54] *Id.* at 129, 35 C.M.R. at 101.

[55] United States v. Fort, 16 U.S.C.M.A. 86, 87–88, 36 C.M.R. 242, 243–44 (1966).

In summarizing the military rule, it would be safe to state that while the Court of Military Appeals purports to apply the same general rule cited in *Parker* as to permissible scope of juror examination, in reality the rule has evolved to a point that the wide discretion vested in the law officer has largely been dissipated by emphasizing the accused's right to an impartial court and the concomitant of that, a right to a searching examination of the attitudes and beliefs of the court members. To this extent the military practice and procedure is significantly different than its civilian counterpart. A study of the civilian cases compels the conclusion that, if anything, there is a trend towards removing voir dire examination from counsel and making it a function of the judge, and of course as has been seen, even where counsel conducts the inquiry, most civilian appellate jurisdictions repose a truly wide discretion in the trial judge in regulating the scope of examination. On the other hand, the Court of Military Appeals has rejected any attempt to remove the examination from counsel and has very distinctly moved from a position of restrictive examination under the strict supervision and discretion of the law officer to one of a wide examination covering almost every relevant belief and attitude a court member might have. While ritual homage is paid to the law officer's power in regulating the scope of the examination, it really appears to be little more than power to guide the inquiry so that it is in an understandable and appropriate form.

Whether the court consciously moved to a rule different from that of the civilian courts is a matter of pure speculation. As has been intimated before, the cases from civilian jurisdictions are not that clear, and they too have reached different results while purporting to apply the same rule.[57] But it could be theorized that the court did consciously reach the result they did in *Sutton* because of the peculiar nature of the military court-martial as distinguished from the civilian jury. A military court is a creature of orders created for the express purpose of deciding cases referred to it by the convening authority, who is in most cases also the commanding officer of the court members. Moreover, by the nature of rank and position of the members, most of whom are either subordinate commanders or members of the convening authority's staff, they have a personal and direct stake in the maintenance of discipline. No fair minded person will deny that the *potential* for abuse exists in such situations. Because of this the court has been quick to strike at even the hint of illegal command influence or the existence of predispositions or prejudices on the part of the court members.[58]

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[56] *Id.* at 89, 36 C.M.R. at 245.

[57] *See* note 31 *supra* and accompanying text.

While the court has not explicitly stated a different rule as to voir dire examination, their opinions do show a great sensitivity to the attitudes and beliefs a court member carriers into court with him. Such a concern is nonexistent in civilian trials, except perhaps in those few cases that have engendered a great deal of newspaper publicity.[59] It could be said that a civilian court will presume a juror can be fair as to the general issues of a case, whereas, perhaps, at least insofar as the court is concerned, no such presumption exists in courts-martial because of the more personal involvement of the member in the system. This makes possible an extensive examination, subject only to the limitations that it be relevant in a very broad sense and that it be phrased in an understandable and proper form. A persuasive argument could therefore be made that the military situation does call for a different approach to examination of the court.

V. VOIR DIRE AS AN INDOCTRINATION DEVICE

As indicated heretofore the main burden of this article is to focus on voir dire examination as a tool of advocacy in influencing or indoctrinating the court-martial members. We have seen in discussing the scope of examination that its use for this purpose along is not proper. It must be made relevant to a possible challenge. Yet it is apparent from the cases so far cited and discussed that much of the litigation as to scope of inquiry has arisen from attempts to bring up legal and factual issues that will arise during the trial, not for the purpose of challenging prospective jurors but for the purpose of gaining a commitment in one form or another that the juror will apply the defense (or prosecution) oriented law to the case or will not be unduly influenced by adverse facts expected to develop at the trial. In this section, then, will be discussed the arguments for and against voir dire examination as an indoctrination device, circumstances where it can be so utilized, and analysis of questions commonly asked.

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[58] *See* United States v. Fort, 16 U.S.C.M.A. 86, 36 C.M.R. 242 (1966); United States v. Sutton, 15 U.S.C.M.A. 531, 36 C.M.R. 29 (1965); United States v. Cleveland, 15 U.S.C.M.A. 213, 35 C.M.R. 185 (1965).

[59] *See* Sheppard v. Maxwell, 384 U.S. 333 (1966).

A. *THE CASE AGAINST INDOCTRINATION BY VOIR DIRE*

Basically, the argument against voir dire examination of this type is that its use in such a manner is a subversion of the legal purpose of examining the jury. A corollary of this argument is that unrestricted voir dire can result in such a serious abuse as to impede the administration of justice. As Judge Latimer pointed out in *Parker,* the variety of questions that can be asked are only limited by the "imagination of counsel." [60] Similarly, consider this language from the New Mexico Supreme Court: "The examination of jurors would be interminable if parties were allowed to take up the whole law of the case item by item, and inquire as to the belief of the jurors and their willingness to apply it." [61] This is somewhat overdrawn. Good sense of counsel, not to mention the trial judge, will ordinarily impose some reasonable limitation far short of this; yet it is apparent that there is potential for abuse. In turn, this has led to curtailing examination by counsel and reposing chief responsibility on the judge. The federal courts by rule 24 of the Federal Rules of Criminal Procedure gave the trial judge almost plenary authority over voir dire examination.[62] California, as a result of real or imagined abuses on the part of counsel, did the same thing by statute.[63] Illinois moved directly against indoctrination by voir dire with a 1958 rule of their Supreme Court which states that counsel "shall not directly and indirectly examine the jurors concerning matters of law or instructions." [64] The reports of the Committees which recommended the adoption of this rule succinctly summarized the arguments against this type of examination:

> The examination of jurors concerning questions of law supposed to be encountered in the case is without question one of the most pernicious practices indulged in by many attorneys. The usual procedure is to inquire as to whether or not jurors will fol-

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[60] United States v. Parker, 6 U.S.C.M.A. 274, 19 C.M.R. 400 (1955).
[61] State v. Douthitt, 26 N.M. 532, 534, 194 P. 879, 880 (1921).
[62] FED. R. CRIM. P. 24.
[63] CAL. PENAL CODE, § 1078 (West 1956).
[64] People v. Lexow, 23 Ill.2d 541, 542, 179 N.2d 683, 684 (1962).

> low certain instructions if given. . . . [The] supposed instructions as orally expounded by the advocate are slanted, argumentative and often . . . clearly erroneous. . . .
>
> . . . [P]ropounding questions of law to the jury is of no aid in arriving at the legitimate purpose of the voir dire, namely, an intelligent exercise of the right of challenge. Such questions are improper and should not be allowed.
>
> . . . .
>
> . . . [M]any lawyers infringe upon the prerogatives of the court and under the guise of eliciting information attempt to impart to the jurors a conception of the law highly favorable to their side of the cause. Such tactics, unfortunately almost universally followed in today's Illinois jury trials, invade the province of the court, are time consuming, tend to confuse the jurors and do nothing to further the purpose of the voir dire procedure. . . .[*]

B. *THE CASE FOR INDOCTRINATION BY VOIR DIRE*

The arguments for allowing counsel to indoctrinate by means of voir dire cannot be found articulated anywhere other than in texts on trial practice. The reason is obvious. If counsel admitted or even inferred this was his reason for conducting an examination, he would lose all legal standing to conduct it. Nevertheless, a case can be made that counsel should, within limits, be allowed to inquire into the juror's attitudes concerning the law or facts of a case. It is generally acknowledged, or at least is part of our legal folklore, that many of the rules of law, particularly those designed to protect seemingly guilty people, are probably pretty much ignored in deliberations as to guilt or innocence. The judge or law officer intones these high sounding rules in a not always interesting or understandable fashion and likely they are promptly forgotten by most of the jurors. For example, instructions to acquit because of insanity, instructions on intoxication as a defense, or instructions to ignore a confession if there is duress or the warning found improper may largely be ignored if the juror thinks the accused probably did the act alleged. The author feels there is nothing wrong with a system that admits such attitudes might exist and allows inquiry concerning them. It is disingenuous to argue that a person prejudiced as to the facts or biased against the particular accused is disqualified from sitting, but a person prejudiced as to the law of the case is not. If it be admitted that few people will acknowledge such a prejudice, at least counsel should be able to force potential jurors to deny such bias. The result would be less of a chance that mere lip service would be paid to some of these so-called "unpopular" but nevertheless important rules of law. There is certainly adequate machinery available in the guise of the trial judge to curb any blatantly improper examination.

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[*] Christian v. New York Cent. R.R., 28 Ill. App.2d 57, 59–60, 170 N.E.2d 183, 185–86 (1960).

C. *THE ACTUAL USE OF VOIR DIRE TO INDOCTRINATE IN CURRENT PRACTICE*

Arguments pro and con aside, there is no doubt but that voir dire examination is extensively used in an attempt to indoctrinate the jury. One recent study,[66] admittedly of a limited scope, concluded that of examinations conducted in one jurisdiction during one session of the court, 80 per cent were designed to indoctrinate the jury and only 20 per cent were legitimately concerned with challenges. Moreover, the inquiries designed to indoctrinate were far more effective. Therefore, the task of this section will be to discuss some of the more common lines of inquiry for a voir dire examination, the main goal of which is to influence or indoctrinate potential jurors. There are perhaps four broad areas of inquiry which lend themselves to possible indoctrination. The first, and most common, are questions which touch upon the law of the case; second, are questions concerning evidence which might be introduced during the trial. This type of question usually takes the form of inquiry as to the impact certain evidence would have on a juror or the effect conflicting evidence would have. The third broad type of question concerns the influence a juror would feel from the other jurors; and finally, there are questions which seek to determine the effect the testimony a certain witness or type of witness would have on the juror.

1. *Examination Concerning the Law of the Case.*

Questions about the law of the case may take the form of inquiry as to whether the jury would follow the instructions of the judge[67] or about specific rules of law or legal defenses that will be relevant to the case. Also, it is common to ask a juror about his reaction to or belief in reasonable doubt,[68] burden of proof,[69] self-defense,[70] or insanity.[71] Such questions are proper provided they are in such a form as to clearly relate to a challenge, although in most civilian jurisdictions it is not an abuse of discretion on the part of the trial judge to disallow them.[72] Certainly in the military the rationale of the *Sutton* case would make such questions proper. When this type of question is disallowed it is often because of some reason aside from the fact that it pertains to the law of the case. For example, such questions are disallowed because the form is seeking a commitment from a juror as to how he will vote,[73] is repetitious,[74] or is worded in such a manner as to render it ambiguous, unclear, or an incorrect statement of the law.[75]

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[66] Broeder, *Voir Dire Examinations: An Empirical Study*, 38 S. CAL. L. REV. 503 (1965).

[67] State v. Dean, 65 S.D. 433, 274 N.W. 817 (1937).

[68] State v. Douthitt, 26 N.M. 532, 194 P. 879 (1921).

[69] State v. Bauer, 189 Minn. 280, 249 N.W. 40 (1933).

[70] State v. Zeigler, 184 La. 829, 167 So. 456 (1936).

[71] State v. Hoagland, 39 Idaho 405, 228 P. 314 (1924).

2. *Examination Concerning Evidence.*

Inquiry concerning the effect of certain evidence commonly occurs when one side expects adverse testimony to be introduced and it is desirable to bring the matter up at voir dire. The purpose of the inquiry on voir dire is to steal the thunder from the other side and also to gain a commitment from the jury that they will disregard the adverse evidence to the extent legally permissible. For example, a record of previous convictions or aggravating circumstances surrounding the alleged offense are often the subject of examination.[76] The tenor of the question is usually directed to whether a juror can disregard such evidence or whether he can and will follow an instruction which requires him to disregard it.[77] Such questions have been held to be proper,[78] although to allow them is not ordinarily considered an abuse of discretion in most civilian jurisdictions.[79] Generally, when such questions are disallowed it is because they are defective in form or purpose rather than because the ultimate line of inquiry is inappropriate.[80] Exclusion would also be proper if the question asked for a commitment from the juror or the phrasing was ambiguous. The most serious defect of questions as to evidence, however, is a failure to properly qualify the question. It may be perfectly proper for such evidence to be considered and weighed by the jury; therefore, to the extent the question infers that the evidence is to be disregarded in its entirety it may be disallowed as an inaccurate statement of the law.[81]

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[72] *See* State v. Douthitt, 26 N.M. 532, 194 P. 879 (1921); Commonwealth v. Barner, 199 Pa. 335, 49 A. 60 (1901).

[73] State v. Bauer, 189 Minn. 280, 249 N.W. 40 (1933).

[74] McKinney v. State, 80 Tex. Crim. 31, 187 S.W. 960 (1916).

[75] State v. Williams, 230 La. 1059, 89 So.2d 899 (1956); State v. Peltier, 229 La. 745, 86 So.2d 693 (1956).

[76] *See, e.g.*, People v. Louzen, 338 Mich. 146, 61 N.W.2d 52 (1953); State v. Dillman, 183 Iowa 1147, 168 N.W.2d 204 (1918).

[77] *See* People v. Louzen, 338 Mich. 146, 61 N.W.2d 52 (1953).

[78] *See, e.g.*, People v. Hosier, 116 N.Y.S. 911 (1909) (prejudicial error not to allow a question as to impact prior convictions of the defendant would have on the jury).

[79] *See, e.g.*, Manning v. State, 7 Okla. Crim. 367, 123 P. 1029 (1912).

[80] *See* People v. Louzen, 338 Mich. 146, 61 N.W.2d 52 (1953).

3. *Inquiry on Conflicting or Evenly Balanced Evidence.*

This type of question is normally phrased this way: If at the end of the trial you determined that the evidence was evenly balanced, that if there was as much reason to believe one side as the other, would you feel compelled to vote for the prosecution?[82] There are decisions,[83] notably from Michigan, that would allow this question, but such a question seems to be clearly improper as to form and purpose. The defects are obvious; not only does the question seek a commitment from the juror as to how he would decide the case, but more importantly, it fails to sufficiently define what is meant by "evenly balanced." The judge can dispense with such a question by stating that he will properly instruct the jury as to the weight to be given evidence and the quantum of proof required, leaving open only the general question as to whether the jury will follow the judge's instructions.[84]

4. *Examination on the Weight to be Given the Testimony of Specific Witnesses.*

This line of inquiry concerns the weight the jury will give to the testimony of certain people or classes of people. Many older cases asked about the ability or willingness of the jury to give as much weight to the testimony of non-whites as that accorded to the testimony of whites.[85] Other questions asked along the same lines concern the effect a juror is willing to give the testimony of a convict, an accomplice, or the accused himself.[86] There are also questions where the inquiry was directed to the weight the jury would give to the testimony of an expert or a police officer.[87] Here again, questions of this sort have been held proper, but the disallowance of them has not been normally considered an abuse of discretion.[88] In addition to upholding the discretion of the trial judge, exclusion of such questions has often been based on the usual defects discussed previously, that is, improperly seeking a commitment, defective phrasing, or repetition. However, the most serious error found in this line of questioning is failure to properly qualify it. For example, as the testimony of a convict, accomplice, or accused ordinarily is not entitled to as much weight as that of another witness, a question implying that such testimony has absolute equality with other testimony should be disallowed as erroneous.[89] Also, a question may be defective in that it attempts to get the juror to commit himself as to the weight he would give one witness singly or as compared to another witness. This inquiry is unrelated to challenges and is nothing more than an attempt to get a juror to commit himself as to the testimony of a witness before he has even heard the witness testify.[90] An illustration of this defect, together with the appellate court's solution as to how to properly ask the question, occurred in *Chavez* v. *United States*.[91] Defense counsel requested the judge to ask the prospective jury this question: "Would any of you place a greater amount of weight upon the testimony of law enforcement officers over that of the defendants?" [92] The court of appeals stated that the exclusion of the question was proper, but went on to state that had the question been properly qualified by asking "whether the prospective juror would give greater or less weight to the testimony of a law enforcement officer than to that of another witness *simply because of his official character*," [93] then it would have been allowable. A subsequent case,[94] citing *Chavez*, found error when the trial judge disallowed the question that the court in *Chavez* had suggested would have been proper. Some lawyer had been doing his homework.

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[81] *See* Manning v. State, 7 Okla. Crim. 367, 123 P. 1029 (1912); State v. Dillman, 183 Iowa 1147, 168 N.W.2d 204 (1918).

[82] *See* People v. Peck, 139 Mich. 680, 103 N.W. 178 (1905).

[83] *E.g., id.*; Towl v. Bradley, 108 Mich. 409, 66 N.W. 347 (1896).

[84] *See* People v. Lockhart, 342 Mich. 595, 70 N.W.2d 802 (1955).

[85] *See* Lee v. State, 164 Md. 550, 165 A. 614 (1933); People v. Car Soy, 57 Cal. 102 (1880).

[86] *See* Frederick v. United States, 163 F.2d 536 (9th Cir. 1947); State v. Smith, 234 La. 19, 99 So.2d (1958); Lesnick v. State, 48 Ohio App. 517, 194 N.E. 443 (1934).

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[87] *See* Sellers v. United States, 271 F.2d 475 (D.C. Cir. 1959); Matney v. State, 26 Ala. App. 527, 163 So. 656 (1935).

[88] *See, e.g.*, Lesnick v. State, 48 Ohio App. 517, 194 N.E. 443 (1934); *cf.* Sellers v. United States, 271 F.2d 475 (D.C. Cir. 1959).

[89] *See* People v. Louzen, 338 Mich. 146, 61 N.W.2d 52 (1953); Manning v. State, 7 Okla. Crim. 367, 123 P. 1029 (1912).

[90] *See* Chavez v. United States, 258 F.2d 816 (10th Cir. 1958); Matney v. State, 26 Ala. App. 527, 163 So. 656 (1935).

[91] 258 F.2d 816 (10th Cir. 1958).

[92] *Id.* at 819.

[93] *Id.*

[94] Sellers v. United States, 271 F.2d 475 (D.C. Cir. 1959).

5. *Examination on the Influence of Fellow Jurors.*

A question commonly asked in civilian courts and normally held properly excluded pertains to whether or not a juror will allow his decision to be influenced by his fellow jurors.[95] The defect in such a question is that it tends to create division among or between jurors when jurors should listen to the opinions of one another. However, such a question, if properly qualified, does seem appropriate to a court-martial because of the rank structure of the court. Thus the question, "Would you allow yourself to be influenced by the other members of the court?", is objectionable for the reasons cited above. On the other hand, it would seemingly become allowable in a court-martial by adding the phrase, "solely because of the superior rank of the other members."

6. *Examination Concerning Predisposition Towards Sentence.*

Questions peculiar to military cases are those pertaining to the attitudes and beliefs of court members towards sentencing. The only civilian parallel are those cases upholding the right to ask about a juror's feelings concerning the death penalty.[96] In a court-martial the question is generally directed towards possible bias in favor of a discharge as part of the sentence. Those most familiar with the military system will concede that the very fact that a case is before a general court-martial has a tendency to predispose the court members to adjudge discharge in the event of conviction. Recognizing this, the court has laid down a very broad rule as to inquiry in this area. "Inflexible attitudes" and predispositions concerning sentence can be inquired into very extensively provided counsel clearly frames the question properly as to purpose and form.[97]

VII. VOIR DIRE BY THE PROSECUTION

The implicit orientation of this article has been the use of voir dire examination by the defense. This is not due to any particular defense bias on the part of the writer but rather to the fact that the case law has largely developed around denial of voir dire to the defense. Denial of voir dire to the trial counsel or prosecution is not an appealable error in the vast majority of American jurisdictions. However, some cases have reached the appellate level on the theory that examination allowed to the prosecution was prejudicial to the accused. These cases do warrant a brief treatment of voir dire by the prosecution.

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[95] *See, e.g.*, State v. Wolfe, 343 S.W.2d 10 (Mo. 1961); Caesar v. State, 135 Tex. Crim. 5, 117 S.W.2d 66 (1938); Walks v. State, 123 Fla. 700, 167 So. 523 (1936).

[96] *See, e.g.*, United States v. Puff, 211 F.2d 171 (2d Cir. 1954). Para. 62*b*, MANUAL FOR COURTS-MARTIAL, UNITED STATES, *1951*, sets forth an example of a proper question whether or not the member has any scruples against the death penalty in a capital case.

[97] The language in Cleveland v. United States, 15 U.S.C.M.A. 213, 35 C.M.R. 185 (1965), and United States v. Fort, 16 U.S.C.M.A. 86, 36 C.M.R. 242 (1966), certainly expresses sensitivity as to the attitudes and beliefs court members carry into court with them. This would imply, as mentioned previously, a very broad and far reaching voir dire into the very mental processes of the members.

Ostensibly, the same general rules apply to both sides of the case. The prosecution may ask any question relevant to the exercise of his challenge, be they for cause or peremptory. Likewise, he may, to the extent that he is successful in relating them to challenges, ask questions designed to indoctrinate the jury. However, common sense suggests that greater restrictions are placed upon the prosecutor. He must be careful not to use voir dire as a guise for the introduction of inflammatory or otherwise inadmissible evidence. There have been a few cases finding error when this was done.[98]

There are no military cases where examination by the trial counsel resulted in reversible error. In *United States* v. *Carver*,[99] the Court of Military Appeals found the error nonprejudicial as it was not directed to the subject matter of the inquiry (*i.e.*, weight a member would give the opinion of an expert), but rather the fact that the trial counsel was seeking to get a member to commit himself to his attitude toward a witness who had already testified.

It could be assumed that the court would apply the same rules on voir dire to trial counsel examination as it would for defense counsel examination, absent an attempt to improperly influence the court.[100]

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[98] *See, e.g.*, People v. James, 140 Cal. App.2d 392, 295 P.2d 510 (1956); State v. Hoffman, 344 Mo. 94, 125 S.W.2d 55 (1939); Nelson v. State, 129 Miss. 288, 92 So. 66 (1922).

[99] 6 U.S.C.M.A. 258, 19 C.M.R. 384 (1955).

[100] Beyond the purview of this article, which is concerned with the scope of examination, are those problems raised when voir dire results in disclosure of information which is prejudicial to the accused, such as a member's knowledge of a previous act of misconduct on the part of the accused. Counsel who is aware of such potential problems should take care that the member is excused prior to trial or is questioned and challenged outside the presence of the other members.

VIII. SOME PRACTICAL RULES FOR PREPARING VOIR DIRE

That voir dire examination can be and should be better utilized is the theme of this article. From the antecedent discussion it is apparent that much of the litigation has arisen because of defects in the form of the inquiry rather than its substance. Since the vast majority of the cases, at least from civilian courts, are finding exclusion of questions proper, it is fairly obvious that poorly executed voir dire often results in exclusion of questions which if properly planned and executed would have been allowed. There are some rules which if applied should at least greatly enhance the chances of having the question accepted. These suggestions are largely limited to examination designed chiefly to indoctrinate the court. While many of them apply equally to an examination seeking possible challenges, by and large such an examination will cause little difficulty. If there is a suspected or known disqualification, or a known or suspected bias on the part of a court member, there will be little problem in either the phrasing or the form of the question. The problem arises, as has been stated throughout this article, when counsel's purpose is to influence the court members by his questions.

1. *Examination Must Only Touch on Important Issues.*

While the argument has been made here, persuasively it is hoped, that there should be more voir dire in courts-martial, this is not to say that there should always be extensive examination or even examination at all. It should be saved for the important issues if it is to have the intended effect. It must be remembered that a military court might hear several cases presented by the same counsel. While each case is separate, it would not do to ignore the fact that the court might have been examined on the same point before in a previous case. Also, there will be routine guilty pleas before a court that has not been immoderate in sentencing. In such a case, examination would not be particularly appropriate by the defense and could be dangerous if conducted by the prosecution.

2. *Examination Should Have a Clear Purpose.*

This ties in somewhat to the first rule. Before asking any question, counsel should first decide what the purpose of the question is and whether the question is framed to aid this purpose. He will then have to relate his examination to what his general analysis of the case has revealed are the crucial issues of law and fact that the court will be called on to decide. The examples are obvious. If reasonable doubt and burden of proof appear to be the chief hope for the defense, then the purpose of examination will be to emphasize these rules in the minds of the court members. Likewise if insanity, self-defense, or intoxication are to be the defenses, the purpose of voir dire will be to negate, insofar as is possible, the unpopularity that such defenses often have in the minds of laymen. The point is that the truly important issues of the case must be isolated and pinpointed, and the inquiry planned to revolve around only those issues (unless of course there is an apparent reason to examine for a possible challenge).

3. *Voir Dire Must Be Thoroughly Prepared.*

Every phrase of a properly tried case demands this; nevertheless, how many times does counsel carefully prepare his case yet stand up to examine the court with little or no preparation and only a vague idea of what he would like to accomplish by voir dire? It is apparent from reading the cases that this often happens. Consider the following question asked in a case arising in Illinois prior to the adoption of their rule forbidding such an inquiry:

> The prosecuting witness may appear to be an elderly white lady who may have parted with various sums of money, and it may develop that this defendant received this money and that she had not received any part of the money back, and she entered into an obligation with this defendant by which she expected to receive large returns for the money that she advanced, and if you are satisfied that this defendant did receive this money, but the criminal intent to defraud her by making representations that are false, and he had knowledge of the falsity, if the state fails to show that this is the truth, would you by your verdict find this defendant not guilty? [101]

Perhaps this is the case that prompted the Illinois Supreme Court to greatly curtail examination as to the law. It is clear that such a question, aimless and with no apparent purpose other than to state the facts of the case in advance of the trial, was not planned or well thought out. This is admittedly an extreme case, yet it can be used to illustrate what proper analysis would have done. The key to the defense was reasonable doubt and burden of proof concerning the intent to defraud; therefore, a simple question to the juror as to his attitude towards these rules would have stood at least some chance of acceptance. Even if a long, rambling question is allowed it will largely lose its effectiveness. The question needs to be incisively drawn, highlighting the issue considered important, else the wheat will get lost in the chaff.

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[101] People v. Robinson, 299 Ill. 617, 618, 132 N.W. 803, 804 (1921).

4. *Examination Should Be Directed To An Individual.*

Collective questions which allow an individual court member to answer more or less anonymously normally do not accomplish the intended result. The very purpose of this type of examination is to force a commitment of sorts from an individual.[102] Only in this way will it have a lasting effect. A court member does not come into court expecting to be placed on the spot. While he may resent it, nevertheless, the fact that all eyes are on him while he is answering the question is likely to make the question and his answers loom large in his mind. Moreover, if a senior member of the court commits himself to belief in or sympathy with a certain rule of law, or commits himself to disregarding certain adverse facts, then this is likely to have at least some effect on the junior members.

5. The Court Should Be Advised of the Purpose of Voir Dire.

The preceding paragraph noted that examination of the court will catch most of the members by surprise; also, particularly in the case of quite senior members, the experience of having their attitudes and beliefs questioned will be relatively novel. The following response to a question posed on voir dire by the court president in *United States* v. *Lynch*[103] will no doubt stir memories of similar instances in the minds of those who have practiced extensively in courts-martial:

> You, as a civilian lawyer, may not be aware that an officer of the United States Army is bound to tell the truth.
>
> . . . .
>
> Possibly, in civilian courts, you do not trust the witnesses or the members of the jury. This is not a jury. This is a court—it's a military court. It is a custom of the service—from all usage of military courts—that those members of the court are officers and—I'm running out of words. I think you know what I mean. There is a difference between civilian trials and military trials.[104]

Defense counsel unsuccessfully challenged the president of the court for cause. The case was naturally reversed, not so much because voir dire was curtailed, but because of the outburst of the president. While the case makes for light reading, the situation at the trial was no doubt rather tense. No matter how well planned and executed, voir dire in such a situation will not accomplish much. The goal is, remember, to ally the court with the questioner's theory of the case. If it is done in such a way as to antagonize the court then it will not accomplish its purpose. This is so whether or not the court should have reasonably been antagonized. Furthermore, there is no sure way of avoiding this type of problem. There will always be a few irreconcilables who simply do not care for the present court-martial system. But there is a way to minimize the possibility of this happening and that is a low-key, simple explanation to the court of the nature of voir dire examination with emphasis on the fact that it is a perfectly legitimate part of the trial process and has express approval of the *Manual for Courts-Martial*. While the law officer might cut off a lengthy discussion, he no less than counsel should wish to avoid the type of situation exemplified by *Lynch*. It might be well to informally advise the law officer prior to the trial that voir dire is planned and invite him to explain to the court its nature and purpose. This would illustrate to the court members his approval of voir dire and remove some of their suspicion.

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[102] Commitment not in the sense of how the member would vote, but rather a commitment as to the willingness to apply a certain rule or ignore a certain fact.

[103] 9 U.S.C.M.A. 523, 26 C.M.R. 303 (1958).

[104] *Id.* at 525–26, 26 C.M.R. at 305–06.

6. *Examination Should Be Phrased to Show a Purpose Consistent with Possible Challenges.*

This point has been made throughout, yet it is clearly the chief defect in questions held improper by appellate courts. In addition to relating to a possible challenge, that is in such a form that a response thereto would be grounds for challenge or an aid in exercising a peremptory challenge, the question should be simple, concise, accurate as to law and facts, and insofar as possible stripped of legalisms not understood by most laymen.

IX. SUGGESTED QUESTIONS FOR VOIR DIRE EXAMINATION

Some suggested questions in areas of inquiry commonly encountered which meet the requirements of most jurisdictions are suggested in this section. The author does not contend that the questions must be allowed, only that there is a reasonable possibility that they will be.

A. *QUESTIONS AS TO LAW*

Are you in sympathy with (or do you agree with) the rule of law that (herein state rule)?

Are you willing to follow the instructions of the law officer without qualifications?

Does the fact that charges have been referred predispose you to a belief that the accused is guilty?

Do you have any bias against a defense based on insanity (or intoxication or any other relevant defense)?

If you determine that there is a reasonable doubt as to the accused's sanity, will you acquit, even though you might feel he committed the act alleged?

B. *QUESTIONS CONCERNING EXPECTED TESTIMONY*

1. *Police.*

Would you give more weight to (or would you believe) the testimony of a policeman simply because he is a policeman?

2. *Officer.*

Would you give more weight to (or would you believe) the testimony of an army officer, solely because of his rank?

3. *Accused.*

Would you tend to disbelieve (or give less weight to) the testimony of the accused, bearing in mind his interest in the case, solely because he is the accused?

4. *Accomplice or Convict.*

If a witness testifies who is a/an (convict) (accomplice) will you give such weight to his testimony as allowed by law regardless of the conviction (complicity)?

C. *SENTENCE*

Would you feel obligated, regardless of extenuation and mitigation, to adjudge a discharge because of the nature of the offense alleged?

Are you predisposed to adjudge a discharge because the case has been referred to a general court-martial?

D. *DELIBERATIONS OF THE COURT—DIRECTED TO JUNIOR MEMBERS*

Lt. ____________, there are several officers of higher rank on the court than yourself. During the deliberations of the court will you allow yourself to be influenced by the opinions of the senior members based solely on their superior rank?

We have seen that voir dire examination may have a usefulness quite apart from its ostensible purpose of aiding in the process of challenges. This use is as a trial tactic for indoctrinating or influencing prospective court members. However, the rules which set forth the guidelines as to what extent such examination may properly go still require that if counsel is to use it as an indoctrinating device he must be careful to plan his questions so as to satisfy the requirement that they relate to possible challenges. If this is done, and it is hoped that this article has suggested ways of doing it, then voir dire can be a positive aid in gaining a more sympathetic court.

A proper balance between the right to inquire into a prospective court member's attitudes and beliefs and the need for an orderly trial can be struck. A rule which emphasizes one to the detriment of the other, however, can result in the inclusion of court members unqualified to sit because of fixed or inelastic attitudes. The ideal rule, which is perhaps pretty close to present military practice, recognizes that such attitudes might exist and will allow inquiry concerning them. On the other hand, the rule must be flexible enough to prevent such limitless and extensive examination that would impede the orderly processes of the court. The discretion accorded to the law officer together with proper preparation by counsel can result in an effective voir dire which can insure to the maximum extent possible a fair and impartial court.

Litigating Speedy Trial

By: Lieutenant Colonel Ronald M. Holdaway

The cases of *United States* v. *Burton*, 21 USCMA 112, 44 CMR 166 (1971) and *United States* v. *Marshall*, 22 USCMA 431, 47 CMR 409 (1973), have effected a revolution in the law concerning speedy trial. *Burton*, of course, established a "90-day" rule for pretrial processing. Of even more significance was the *Marshall* case that completely re-defined the rules concerning the concept of prosecutorial "diligence" in the processing of a case that extended beyond 90 days. Such things as heavy case loads and personnel shortages, factors that were (and are) considered in determining diligence in non-*Burton* cases, were excluded. Notwithstanding this radical change, there are, for delays extending beyond 90 days, still too many cases where speedy trial is litigated in the same manner as before. So-called chronologies are introduced which really do little more than show the appellate court the status of the case at various stages. Very few of these documents ever show why it took a certain number of days to move the case from one level of command to another; why it took a certain number of days to conduct an Article 32 investigation; why it took the time it did to prepare a pretrial advice; or why a judge was not available until a certain date or what efforts were made to obtain another one if the judge who usually sat was unavailable. In *United States* v. *Reitz*, 22 USCMA 584, 48 CMR 178 (1974) Chief Judge Duncan noted that:

> If there are extraordinary circumstances or unusual difficulties in prosecuting a particular case, the Government should make them a matter of record in replying to a defense motion for dismissal of the charges. Similarly, if there is in fact a defense agreement to delay of the prosecution it should also be noted on the record. . . . Appellate argument, however well-intended, cannot be substituted for the facts.

This admonition admirably sums up the burden that a trial counsel faces if he is to sustain the "extra-heavy" burden of *Burton-Marshall*. Counsel who has such a case must carefully analyze his facts and proceed on the basis that if he does not have documented defense delays or truly extraordinary circumstances he will surely lose his case at the threshold if not on appeal. If there were delays caused by extra-ordinary or unusual circumstances, counsel must be prepared to show not only the putatively unusual circumstances themselves, but why they caused the delay, how much of the delay was attributable to these circumstances, and what steps were taken to overcome the difficulty. These *facts* must be placed in the record! In short, counsel must ask himself: Why is this case different than most others that were tried within 90 days? Why was this case not so tried? The answer to these questions will, hopefully, be the facts of record sustaining the *Burton* burden. Similarly, if part of the delay was at the request, or with the concurrence, of the defense these facts must be documented. For example, suppose that the judge who normally tries cases in a particular jurisdiction will not be available for two or three weeks. Very often the defense will prefer to wait because of a desire for that particular judge. If such is the case, the trial counsel must document the defense's desire for that particular judge. This may be done either by a defense continuance or a Memorandum for Record executed by trial counsel wherein he "documents" the verbal request of the defense that were expressed to him by counsel. It is important in all instances where it appears that the defense wants both a delay and the advantages of the *Burton* rule that they be forced to make an election and that the election be made a matter of record. The *Burton* rule is a safeguard for the accused's rights; it should not be subverted into a shield against prosecution if in fact the defense was not ready to proceed or acceded to the delay. Again, it is worth repeating to all trial counsel—*Document* the lack of defense readiness and/or the defense agreement to delay.

Litigating Defense Requests For Witnesses

A Note From The Government Appellate Division

By: Lieutenant Colonel Ronald M. Holdaway, Chief,
Government Appellate Division, USALSA

Curtailment of funds available for official travel is no passing phenomenon and will likely stimulate fresh litigation on the issue of defense requested witnesses who are geographically removed from the site of the trial. I have a general impression from cases I have read over the past four years where the issue was *not* raised (because the prosecution acceded to the request) that many witnesses had their travel paid by the government when their "materiality and necessity" was marginal at best. No doubt shortages of money will force trial counsel to contest more vigorously the need for such witnesses. In anticipation of renewed interest on this issue, a review of the law concerning defense-requested witnesses is in order.

The Law

As in many areas of the law, the rules can be stated simply and succinctly. It is the application of the general rules to the specific facts that raise the difficulty.

An accused is entitled to an "equal opportunity" to obtain witnesses. (Article 46, Uniform Code of Military Justice, Paragraph 115, *Manual for Court-Martial*, 1969, (Rev. Ed.)). In addition, those witnesses who are necessary and material to an accused's defense must, if available, be obtained at government expense as a matter of sixth amendment due process. *United States v. Sweeney*, 14 USCMA 599, 34 CMR 379 (1964). This right applies also to witnesses in extenuation and mitigation, although there is dicta in *United States v. Manos*, 17 USCMA 10, 37 CMR 274 (1967), indicating an adequate substitute for "live" testimony during extenuation and mitigation may be acceptable in most cases. Furthermore, the burden of establishing "necessity and materiality" is that of the requesting party. (Paragraph 67e, *Manual for Courts-Martial*, 1969 (Rev. Ed); *United States v. De Angelis*, 3 USCMA 248, 12 CMR 54 (1953)).

Upon review, a ruling denying a defense-requested witness, will not be litigated *de novo* but is measured against an "abuse of discretion" standard. (*United States v. Sweeney, supra*). That is, the judge will be upheld so long as his ruling was not arbitrary, unfair, or capricious and was supported by the evidence. Finally, even if the appellate court ultimately determines that the ruling was in error, the effect of the error must result in specific prejudice before the findings or sentence will be reversed. *United States v. McElhinney*, 21 USCMA 436, 45 CMR 210 (1972).

It can readily be seen that these rules impose a rather heavy burden on the requesting party. Yet, as alluded to above, one gets the impression from reading many transcripts of trial that the actual practice is a good deal more liberal. In some instances witnesses have been subpoenaed on the mere averment (as opposed to the proof) of materiality and necessity. In other instances the defense appears to be requesting what amounts to a government subsidized family reunion. In still other cases a "laundry list" of proposed witnesses is submitted apparently in hopes that there will be partial compliance, or, as is more likely, such a request is used as a ploy to force delay or a favorable pretrial agreement. In sum, the prosecution, perhaps out of desire to avoid any possibility of reversal, has in many cases acceded to or compromised on a defense request for witnesses without requiring the accused to carry his burden of proving materiality and necessity by a preponderance of the evidence. While such non-advocacy is commendable where necessity and materiality is manifest, a trial counsel who foregoes litigation of this issue if there is any reasonable possibility of success surely misconceives his role in the adversary process. This is particularly true where, if the trial counsel is successful, the judge's ruling can be reversed only if the appellate court finds an abuse of discretion and specific prejudice.

A trial counsel should then require the appellant to comply strictly with the requirements of Paragraph 115, *Manual for Courts-Martial, United States, 1969* (Rev.). (See *United States v. Harvey*, 8 USCMA 538, 25 CMR 42 (1957)). Necessity and materiality must be proved, not simply alleged, as otherwise the request is little more than a fishing expedition. Finally, trial counsel should impress upon the judge wherein the burden lies and should never permit the onus to be shifted to the government to disprove necessity and materiality. If the accused cannot show that the requested testimony goes "to the core of his defense", (*United States v. Thornton*, 8 USCMA 446, 24 CMR 256 (1951); *McElhinney, supra*), then trial counsel ill serves the public by acceding to the request.

The question whether the alleged testimony is necessary and material normally is fairly simple to resolve. The harder questions will be whether the accused has hefted his burden of proving that the putative witness actually did observe that which he is alleged to have seen, and whether it has been shown that he will *in fact* testify as claimed. For example, a request framed in terms that Private X saw the alleged event and that he *might* corroborate the accused's version would not be sufficient. That is not a request for a witness; it is a request for a hoped-for witness. The accused should show, either by testimony from the Article 32, affidavit, averment that counsel has talked to the witness, or otherwise that the potential witness would in fact testify to matters that were both necessary and material to the accused. In short, a request simply for anyone and everyone who witnessed the alleged crime when it is apparent that the defense counsel does not know what they will testify to, or in the *hope* that they will testify for the accused, is not sufficient proof of materiality and necessity. See *De Angelis, supra*. Moreover, if the defense counsel does aver that a requested witness will, in fact, testify to an essential matter, the trial counsel should be alert to challenge the averment. For example, in *United States* v. *Jones*, 21 USCMA 215, 44 CMR 269 (1972), the accused requested certain witnesses who, he claimed, would corroborate his version of the incident. It appeared, from reading the record and the allied papers, that the requested witnesses did in fact observe the incident; however, there was nothing whatever to indicate whose version of the event, if either, they would have corroborated.[1] The Court of Military Appeals ultimately ruled in favor of the accused only because the trial counsel did not rebut or otherwise challenge the averment that the witnesses would testify in favor of the accused. The trial counsel should have exposed the accused's averment of necessity and materiality for what it was, nothing more than speculation as to what the witness would testify to.

Character Evidence

Testimony concerning good character of the accused presents special problems. While there is no doubt that such evidence can be necessary and material in a given case (see *United States v. Sweeney, supra*), it is not the kind of testimony, even though relevant, which is often the "core of the defense". Thus, if character evidence is peripheral to the issue or if the evidence of guilt is overwhelming, a denial of relevant defense-requested character witnesses, even on the merits, will likely not be reversible error (compare *United States v. Sweeney, supra* with *United States v. Harvey, supra*, see also *McElhinney, supra*). Moreover, if an accused is able to prove good character through "local" witnesses, it is highly unlikely that the refusal to produce a witness from afar whose testimony would be largely cumulative would be erroneous. An exception would be a case like *Sweeney* where the requested character witness was of such overwhelming importance (a flag officer) that his testimony would likely be the core of the accused's case. Here again trial counsel should be prepared to challenge averments of necessity and materiality and should bear down hard on the accused's burden of proof. If there is locally available evidence of good character, the burden should be stated in terms of a responsibility to prove that the requested testimony is *not* cumulative.

When the character testimony is to be used only in sentencing, the accused would seem to have even a higher burden. Not only must he prove materiality and necessity but it would appear from dicta in *United States v. Manos, supra*, that "live" testimony need not be furnished if there is adequate substitute testimony. Trial counsel should explore such substitutes as stipulations,[2] written interrogatories (see para. 177(c), *MCM*), or concessions (see last paragraph of paragraph 115(a) of the *Manual*).[3] The trial counsel should avoid compromising solely because he is confronted with a lengthy list of character witnesses. If necessity and materiality cannot be proven, none of the witness should be subpoenaed. Conversely, if any are subpoenaed, it should be because necessity and materiality have been shown, not because there was a friendly agreement to compromise. Moreover, if an accused claims that live appearance is essential and that substitute testimony is inadequate, he should be " put to his proof ". unless such averment is manifestly correct. Again, it is the accused's burden to prove *both* materiality and necessity.

Footnotes

[1] The facts as outlined above are taken from government pleadings and were not all recounted in the reported case.

[2] Stipulations of course require defense cooperation. The accused should not be expected to waive his right to assert on appeal that he should have been permitted live testimony as a price for obtaining a stipulation.

[3] Trial counsel should also be prepared to concede undisputed or nonessential facts on the merits of the case.

ADDITIONAL QUESTIONS FOR NOMINEES TO THE UNITED STATES COURT OF VETERANS APPEALS
(To Be Made Public)

Bar associations: List all bar associations and legal or judicial-related committees or conferences of which you are or have been a member and give the titles and dates of any offices which you have held in such groups.

American Bar Association - No offices

Wyoming State Bar Association - No offices

Court admissions: List all courts in which you have been admitted to practice, with dates of admission and lapses if any such memberships lapsed. Explain the reason for any lapse of membership. Give the same information for administrative bodies which require special admission to practice.

Supreme Court of Wyoming - 1959-Present

Federal District Court of Wyoming - 1959-Present

United States Court of Military Appeals - 1960-Present

Supreme Court of the United States - 1967-Present

United States Army Court of Military Review - 1970-Present

Judicial office: State (chronologically) any judicial offices you have held and whether you were elected or appointed to them and provide a description of the jurisdiction of each such court.

Appointed - Military Trial Judge 1969-1970 - Tried 3 Special Courts-Martial.

Appointed - Chief Judge, United States Army Court of Military Review - Intermediate appellate court for General Courts-Martial and Special Courts-Martial authorized to adjudge punitive discharge.

Additional Questions

Judicial Opinions.

1. I have previously furnished the Committee with all the opinions I wrote as Chief Judge of the Army Court of Military Review. The following cites are furnished for the more significant ones:

United States v. Ludlam, 26, M.J. 812 (1988)
United States v. Hallums, 26 M.J. 838 (1988)
United States v. Wirth, 25 M.J. 863 (1988)
United States v. Simpson, 25 M.J. 865 (1988)
United States v. Foust, 25 M.J. 647 (1987)
United States v. Tuck, 28 M.J. 520 (1989)
United States v. Moody, 27 M.J. 683 (1988)
United States v. Dock, 26 M.J. 620 (1988)
United States v. Melick, Memo Opinion, copy attached
United States v. Beard, Memo Opinion, copy attached

2. So far as I know most of these opinions have been affirmed. Some may still be "on appeal". In any event as of the time of my retirement (30 Nov. 1989), none of these cases had either been overturned or criticized by the United States Court of Military Appeals.

Speeches.

I have given many speeches over the years to diverse groups of lawyers and non lawyers. These have always been *ex tempore*. I have touched upon constitutional matters in several law day speeches both here and in Europe. The attached newspaper article from Anniston, Alabama is the only article of which I am aware that my remarks were reported. It is a reasonably accurate account of the sense of my message which was really a bit more subtle, *i.e.*, the influence of common law judicial techniques on constitutional law.

Law speaker praises Constitution

By JOHN RONNER
Star Staff Writer

The number three man in the Army's legal system, who spearheaded the government's case during Lt. William Calley's My Lai murder appeal, told Annistonians Friday that the U.S. Constitution has survived 200 years because of its flexibility and strong, independent judges.

Brig. Gen. Ronald M. Holdaway, the chief judge of the Army's Court of Military Review, the highest Army tribunal, said independent American judges have been willing to adapt and mold the Constitution to changing times, resulting in legal, rather than violent revolutions.

As a result, he said, the United States has had one supreme law of the land since the late 1700s while France, typical of many European countries, has had five republics, two monarchies and two empires in the same period.

"We've had real revolutions in this country that took place under the umbrella of a flexible Constitution and through the actions of an independent judiciary," the general said.

He mentioned civil rights as one arena of judicial reinterpretation of the law.

HOLDAWAY'S REMARKS came during a Law Week luncheon of local judges and attorneys at the Anniston Country Club. The Calhoun County Bar Association, which sponsors Law Week, has traditionally brought in high-profile speakers during Law Week, including U.S. Supreme Court Justice Sandra Day O'Connor in 1986 and former CBS law correspondent Fred Graham and U.S. District Judge Brevard Hand in 1987.

During his talk, Holdaway said that Europeans are often patronizing about America's young history, even the historic Williamsburg seeming recent to them. But Holdaway said Europe respects the fact that, as far as constitutional law is concerned, America has the longer heritage.

Holdaway said that, no matter the debate between strict and liberal constructionists over Constitutional interpretation, the fact is that federal judges have always been willing to reinterpret the Constitution in light of the times. Holdaway noted, though, that the moods of various courts have swung from conservative to liberal and back over time.

In the 1970s, the 53-year-old Holdaway was the chief counsel representing the government as Lt. Calley appealed his murder conviction through higher military courts. Calley's court martial conviction stemmed from the American massacre of South Vietnamese villagers at My Lai.

CALLEY ALLEGED 33 court martial errors on appeal and his main defense was that he was following orders. Holdaway, then a lieutenant colonel, counter-argued that Calley was not following orders and even if he had been, the orders were clearly illegal and should have been ignored.

During his speech, Holdaway said America's legal greatness does not stem from the fact that we are a land of laws, but because those laws are fashioned and applied with justice and individual rights in mind.

After all, Holdaway noted, Nazi Germany was a land of laws, too, in which brutal SS troops were meticulous about legalities during their butchery.

"They made sure they did everything with scrupulous legality. Unfortunately, it was Nazi legality," Holdaway said.

Holdaway called the American notion that the law should recognize individual rights a "recent idea in history."

Holdaway became the chief justice of the Army Court of Military Review in July.

Legal Career.

I have spent my entire legal career as a uniformed lawyer in the Army. The practice of Army law is a good deal more complex and diverse than those unfamiliar with it are aware. I have performed almost every conceivable duty that a Judge Advocate could perform. I spent my early years as a defense counsel and/or prosecutor at general courts-martial. I tried or defended upwards of 150 - 200 cases in those years. I also acted as claims officer, adviser on administrative law, adviser on contract law, and also rendered personal legal assistance to soldiers and their families. As I became more senior in grade I assumed more managerial and administrative duties. In addition to acting as command legal adviser I have twice been a staff judge advocate (at Corps and Div.) where I functioned as manager of a legal staff and personal legal adviser to the commander on all legal matters, civil, criminal, and also international law. As the Assistant Judge Advocate General for Civil Law (1981-1983) I coordinated all legal matters of the Army in connection with civil and tort litigation, environmental law, and contract law.

As the judge advocate in Europe I was the chief counsel for the command and personal legal adviser on the staff of the commander. These duties included liaison with the legal authorities of other NATO countries. Pertinently for the position now under consideration, I have been Chief Judge of the Army's appellate court. Some years previously I was also the Chief of the Government Appellate Division where I was responsible for representing the government's position on all courts-martial appeals (some 2500-4000 cases per year). As such I supervised the writing of briefs and oral arguments by a staff of some 35 young lawyers. I personally wrote briefs and argued cases as time permitted.

Litigation.

If this is meant to include criminal litigation - suffice it to say I have personally handled hundreds of cases at trial level and hundreds more on appeal. I list 3 as having some significance in military jurisprudence:

United States v. Burton, 44 C.M.R. 166 (1971)
United States v. Weshenfelder, 43 C.M.R. 256 (1971)
United States v. Calley, 48 C.M.R. 19 (1973)

3. Describe your typical former clients and the areas, if any, in which you have specialized.

Soldiers and commanders. I have not really specialized although I have a great deal of experience at the trial and appellate level in criminal law.

4. State whether you have appeared in court frequently, occasionally, or not at all. If the frequency of your appearances in court has varied over time, describe each such variance, giving dates.

1960-1967 - Frequently as trial lawyer in General Courts-Martial

1970-1975 - Frequently as appellate counsel before the Army Court of Military Review and Army Court of Military Appeals.

5. State the number of cases in courts of record you tried to verdict or judgment (rather than settled), indicating whether you were sole counsel, chief counsel, or associate counsel, and identify the courts.

I believe I have answered this previously insofar as it applies to courts-martial.

Legal Activities.

As command counsel at 3 levels - division, corps, and theater (U.S. Army Europe) I have been involved in literally hundreds of significant legal problems (significant that is, to the command). I will mention a few in as brief and intelligible manner as possible:

(1) Rules on the use of force in Europe to protect our installations during sometimes hostile and violent demonstrations. This involved protracted and sensitive discussions with host-nation officials to assure them that our rules on the use of force complied with treaty obligations.

(2) U.S. NATO Treaty rights in connection with Army activities such as training and maneuvers. Negotiation with host nation authorities and coordination of legal challenges in foreign courts.

(3) Suspension and debarment of contractors for malfeasance or non-feasance. I was the decision maker on debarments for the Department of the Army for 3 years and for U.S. Army Europe for 4 years. See Peter Kiewit v. Corps of Engineers, 714 F.2d 163 (1983) for an example of such a case.

(4) Legal oversight over intelligence gathering activities in Berlin and other European sites. This was to ensure our intelligence activities were in conformity with congressional and executive directive.

(5) Liaison with foreign governments on criminal jurisdiction, taxation, foreign litigation, and related matters in NATO.

(6) Supervision over compliance with Geneva convention and Hague Regulations rules in combat in Vietnam. I was SJA of the 1st Cavalry Division in 1969-1970.

Outside employment: None

Party Affiliation.

I am affiliated with no political party nor have I ever directly or indirectly by financial contribution or otherwise participated in any party activities. I vote in Wyoming and with one exception (1976) have voted in every general election since 1956. Except for 1956 all voting has been by absentee ballot. I have sporadically voted in Primary elections. Wyoming has a closed system. I have requested Democratic ballots most times. As I recall I have twice (including 1988) requested Republican ballots. Local candidates have dictated which ballots I have requested. I am by conviction and practice an Independent, affiliated with no political party.

Memberships in certain organizations: The American Bar Association's Commentary to Canon 2 of its Code of Judicial Conduct states, "It is inappropriate for a judge to hold membership in any organization that practices invidious discrimination on the basis of race, sex, religion, or national origin." Do you currently belong, or have you belonged, to any organization which discriminates in this manner -- through either formal membership requirements or the practical implementation of membership policies? If so (a) list all such organizations of which you are or were a member, (b) provide the dates of your memberships, and (c) describe in each case the efforts you made to try to change the organization's discriminatory policies or practices.

I have never belonged, nor do I now belong to any such organization.

Services for disadvantaged persons: The American Bar Association in its Comment to Rule 6.1 of its Model Rules of Professional Conduct calls for "every lawyer, regardless of professional prominence or professional workload, to find some time to participate in serving the disadvantaged." Attach a statement describing what you have done to fulfill this responsibility, listing specific instances and the amount of time devoted to each.

Legal services are available equally to all in the military community.

Selection process:

Has anyone involved in the process of selecting you as a nominee discussed with you any specific case, legal issue, or question in a manner that could reasonably be interpreted as seeking any express or implied assurances concerning your position on such case, issue, or question? If so, please explain fully.

No

AFFIDAVIT.

State of Virginia)ss
County of Fairfax

, being duly sworn, hereby states that he/she has read and signed the foregoing Additional Questions for Nominees to the United States Court of Veterans Appeals and that the information provided therein is, to the best of his/her knowledge and belief, current, accurate, and complete.

Ronald M. Holdaway
Signature of Nominee

Subscribed and sworn before me this 26th day of January , 1990

Mary B. Dennis
Notary Public

My commission expires: 7-27-90

UNITED STATES ARMY COURT OF MILITARY REVIEW

Before
HOLDAWAY, MYERS, and CARMICHAEL
Appellate Military Judges

UNITED STATES, Appellee	)	ACMR 8702077
	)	
v.	)	US Army Air Defense Artillery
	)	Center and Fort Bliss
Sergeant JOSEPH L. MELNICK,	)	
288-70-6657,	)	J.C. Malinoski, Jr.,
United States Army, Appellant	)	Military Judge

For Appellant: Captain Jeffrey J. Fleming, JAGC (argued); Lieutenant Colonel Joel D. Miller, JAGC, Major Stewart C. Hudson, JAGC, Major Kathleen A. Vanderboom, JAGC (on brief).

For Appellee: Captain Joseph P. Falcone, JAGC (argued); Colonel Norman G. Cooper, JAGC, Lieutenant Colonel Gary F. Roberson, JAGC, Major Kathryn F. Forrester, JAGC (on brief).

12 December 1988

MEMORANDUM OPINION

HOLDAWAY, Chief Judge:

On 10 and 11 September 1987, the appellant was tried by a general court-martial composed of officer members at Fort Bliss, Texas. Contrary to his pleas, he was convicted of one specification of conspiracy, six specifications of wrongful sale of military property, one specification of attempted wrongful sale of military property, seven specifications of larceny and one specification of wrongful receipt of stolen property. The convening authority disapproved the finding of guilty as to the one specification of attempted wrongful sale of military property, dismissed it, approved the remaining findings and approved a sentence of a dishonorable discharge, confinement for ten years, total forfeitures, and reduction to Private E-1.

Among other alleged errors, appellant contends that the military judge erred by failing to instruct the court on mistake

JALS-ZXL

of fact as to the larceny and receiving stolen property specifications.

The appellant was apprehended and charged as a result of a Criminal Investigation Division "sting" operation. In reviewing the facts, there is no dispute that the appellant sold property, allegedly owned by the government, to an undercover agent. Indeed, the transactions were videotaped. In addition, the appellant made an extensive post-trial statement detailing how he obtained the property he sold. He defended on the basis that he in fact and law owned the property. As to some of the property, he claimed to be, in effect, a bona-fide purchaser at off-post outlets; as to other categories of property, he claimed it was abandoned by the government. He presented evidence from himself and others supporting these claims of ownership.

At trial, the court was instructed on the necessity to find beyond a reasonable doubt that the property belonged to the government. As to the larceny specifications, the court was also instructed on the need to find beyond a reasonable doubt that the appellant had to have the specific intent (mens rea) to deprive the government of its property. We may assume that the court followed these instructions and did find beyond a reasonable doubt that the property was government property and that the accused did have the specific intent to deprive the government of its property. Just prior to turning the case over to the court, the trial judge, at a side-bar conference, asked counsel whether the court should be instructed on mistake of fact as to ownership. Defense counsel, it appears more opportunistically than reflectively, said yes. The trial counsel thought not. In any event, an instruction was given on honest and reasonable mistake of fact, but only as to the "sale" specifications (Charge II). The issues now presented to this court are whether the mistake of fact instruction should have been given as to all the charges and their specifications, and as to the "sale" specifications, whether the instruction should have encompassed only honest mistake rather than honest and reasonable.

Mistake, in the context of this case, whether it be characterized as mistake of fact or law, is simply a facet of the issue of ownership. At trial, the appellant did not claim a mistake as to ownership nor did his counsel argue that his client was mistaken as to ownership. Rather he presented facts which, if believed, made a plausible claim of actual, as opposed to imagined or mistaken, ownership. The critical question, indeed the only question before the trial court, was the credibility of the appellant's claim of ownership, not whether he had a mistaken belief as to his claim. Had the military judge given no instruction on mistake, then this court would reject any assertion that the evidence had sufficiently raised the issue of mistake.

However, having injected the issue of mistake, the question now, simply put, is whether it was error to restrict the instruction to only the sale specifications. We hold that it was error. As previously noted, the only issue for the court members to decide was that of ownership of the property. The members were only instructed, as to this issue, that ownership was an element of the offenses. They were given no instructions, nor were any requested, as to the principles of property law that would have enabled them to determine the controverted issue of ownership; for example, the concept of bona-fide purchases or that of abandonment. Such untailored instructions might have been sufficient had the military judge not confused the issue by interjecting the concept of mistake. However, with no real guidelines as to how to resolve the question of legal ownership, the "mistake" instruction, applying as it did to only one set of specifications, could only have confused the members.

We find therefore that it was harmful error, having instructed on the issue of mistake, to fail to apply the instruction to all the offenses charged. Using the guidance in United States v. Sales, 22 M.J. 305 (C.M.A. 1986), we will reassess the sentence.

Because the court was fully instructed as to mistake on the offenses of wrongful sale, those offenses do not suffer from this deficiency. We reject the appellant's contention that the mistake need only to have been honest. The bright line rule is that general intent offenses (such as sale of military property) require a mistake to be both honest and reasonable. See United States v. Johnson, 25 M.J. 691 (A.C.M.R. 1987); United States v. Brown, 22 M.J. 448 (C.M.A. 1986); United States v. Carr, 18 M.J. 297, 301 (C.M.A. 1984). We see no reason to extend that rule.[1] We have considered the other errors raised and find them to be without merit.

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[1] Criminal law should provide guidelines for the proverbial "reasonably prudent man." To the extent we excuse honest mistake or, what amounts to the same thing, personal belief by the defendant that he has committed no crime, however unreasonable that belief is, then we import into the law a dangerous view that criminality is a matter to be determined by a subjective measure rather than an objective one. As Professor Kadish stated:

> The criminal law, in contrast to social mores, must serve as a clear, explicit guide to lawful conduct. It must also discourage the belief that a 'loophole' can always be found to escape prosecution.

(Continued)

In accordance with these views, the findings of guilty to Charges I, III, and IV and their specifications are set aside and hereby dismissed. The remaining findings of guilty are affirmed. Reassessing the sentence on the basis of the errors noted and the entire record, the court affirms only so much of the sentence as provides for reduction to Private E-1, forfeiture of all pay and allowances, a dishonorable discharge, and confinement for four years.

Senior Judge MYERS and Judge CARMICHAEL concur.

FOR THE COURT:

WILLIAM S. FULTON, JR.
Clerk of Court

(Footnote continued)

Kadish, Excusing Crime, 75 Cal. L. Rev. 257 at 270 (1987). To the same effect *see* Mr. Justice Holmes' The Common Law (1881), wherein the theme throughout the entire book is that the common law is based on external (objective) standards not internal (subjective) ones. For instance, his famous statement that "It is no doubt true that there are many cases in which the criminal could not have known that he was breaking the law, but to admit the excuse at all would be to encourage ignorance." *Id.* at 41. *Cf.* United States v. Turner, 27 M.J. 217 (C.M.A. 1988).

UNITED STATES ARMY COURT OF MILITARY REVIEW

Before
HOLDAWAY, THORNOCK, and CARMICHAEL
Appellate Military Judges

UNITED STATES, Appellee) ACMR 8800328
)
v.) 1st Cavalry Division
)
Sergeant THOMAS B. BEARD,)
414-98-3113,) S. V. Saynisch,
United States Army, Appellant) Military Judge

For Appellant: Lieutenant Colonel Russell S. Estey, JAGC, Major Hollis Lewis, JAGC, USAR, Captain Alfred H. Novotne, JAGC (on brief).

For Appellee: Colonel Norman G. Cooper, JAGC, Lieutenant Colonel Gary F. Roberson, JAGC, Captain Martin D. Carpenter, JAGC, Captain Jody M. Prescott, JAGC (on brief).

30 JAN 1989

MEMORANDUM OPINION

HOLDAWAY, Chief Judge:

The appellant was found guilty, pursuant to his pleas, of a variety of charges stemming from his application for and acceptance of government benefits as a married person when, in fact, he was not. His troubles began when he was divorced and neglected, as it was his duty to do, to advise the appropriate personnel and finance offices that he was no longer entitled to the basic allowance for quarters (BAQ) at the "with dependents" rate. This constituted larceny. Upon a permanent change of station from Korea to Fort Hood, he committed other offenses by applying for and accepting family quarters based upon his putative married status. Finally, in an attempt to convince the Criminal Investigation Division that he was in fact married, he altered a Korean marriage certificate and inserted his name in place of the real bridegroom. This was charged as forgery.

The issue now raised as to the latter charge is whether a marriage certificate is the kind of document that has the necessary "legal efficacy" so as to constitute forgery within the meaning of military law.

In United States v. Thomas, 25 M.J. 396 (C.M.A. 1988), the Court of Military Appeals, in a scholarly and comprehensive opinion, traced the history of forgery as it is defined in military law. The Court's conclusion was that in order to constitute forgery, the document involved must have legal efficacy on its face; that is, the document by itself has to be the sort that, if genuine, imposes a legal liability on another. The Thomas case involved a "commanding officer's letter" that was used in connection with a loan application. The Court determined, quite naturally, that while such a letter was useful (even perhaps necessary) in getting a loan, it did not impose any legal obligation on the lending institution to grant a loan. Hence, it did not on its face impose a legal liability. See United States v. Vogan, ACMR 8702885, slip op. at 2 (A.C.M.R. 26 Jan. 1989).

In the case before us, the marriage certificate, if genuine, would have ipso facto imposed a legal liability on the government to pay the appellant the BAQ at the "with dependents" rate. The appellant would also have been legally entitled to family quarters. Manifestly, therefore, this document is the sort that has legal efficacy. It follows, ineluctably, that forgery is the appropriate charge.[1] We so hold.

The findings of guilty and the sentence are affirmed.

Senior Judge THORNOCK and Judge CARMICHAEL concur.

FOR THE COURT:

WILLIAM S. FULTON, JR.
Clerk of Court

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[1] It is interesting to note in Thomas that in tracing forgery back to its common-law origins, the inestimable Blackstone was cited as listing several kinds of documents that were the subject of forgery at common law. One of these was a marriage license. The Court of Military Appeals stated that "all these specific writings to which Blackstone adverted appear to be of the sort having apparent legal efficacy." Thomas at 398.

United States
Office of Government Ethics
Suite 500, 1201 New York Avenue, N.W.
Washington, D.C. 20005-3919

January 31, 1990

The Honorable Alan Cranston
Chairman
Committee on Veterans' Affairs
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

In accordance with the Ethics in Government Act of 1978, I enclose a copy of the financial disclosure report filed by Ronald M. Holdaway, who has been nominated by President Bush to the position of Associate Judge of the United States Court of Veterans Appeals.

We have reviewed the report and have also obtained advice from the Court of Veterans Appeals concerning any possible conflict in light of its functions and the nominee's proposed duties.

Based thereon, we believe that Mr. Ronald M. Holdaway is in compliance with applicable laws and regulations governing conflicts of interest.

Sincerely,

Donald E. Campbell

Donald E. Campbell
Acting Director

Enclosure

OGE-106
October 1989